(25,304)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 488.

JOHN P. BROGAN, PLAINTIFF IN ERROR,

vs.

THE NATIONAL SURETY COMPANY

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1916.

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a-77 *Claim and Intervention of J. P. Brogan.*

(Without Exhibit.)

Filed July 8, 1913.

WESTERN DISTRICT OF MICHIGAN, *ss:*

The United States of America, for the use and benefit of The Pittsburgh & Buffalo Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio,
78 plaintiff in this suit, and also for John P. Brogan, a citizen of the State of Ohio, as claimant and intervenor by leave of court herein first had and obtained in this cause by E. S. B. Sutton, his attorney, and the said claimant and intervenor, to-wit: John P. Brogan claims and complains of the said The Standard Contracting Company and the said The National Surety Company, who were each duly summoned herein to answer to the said plaintiff of a plea that they render unto the said plaintiff the sum of, to-wit, twenty-five thousand dollars ($25,000.00), lawful money of the United States of America, which they jointly and severally owe to, and unjustly detain from, the said plaintiff, and also the said John P. Brogan, this claimant and intervenor, and the said plaintiff alleges that the said The Pittsburgh & Buffalo Company is a citizen and resident of the State of Ohio, and is a corporation created and existing under the laws of the State of Ohio; that the said The Standard Contracting Company is a citizen and resident of the said State of Ohio, and is a corporation created and existing under the laws of the State of Ohio, and that John P. Brogan is a citizen of the State of Ohio, and engaged in the business of selling groceries and other supplies in the City of Cleveland in said State, and that the National Surety Company is a corporation created and existing under the laws of the State of New York, and is a citizen and resident of said last named State, and is authorized to do, and is doing, a general surety and bonding business in the State of Michigan, under due authority of said State to it granted by license therefor.

For that, whereas, the said defendants heretofore, to-wit: At the City of Cleveland, in the State of Ohio, and, to-wit, at the City of Sault Ste. Marie, in the State of Michigan, on the 12th day of August, 1908, in the Western District of Michigan, by their certain writing obligatory, sealed with their seals, the date whereof is the same date and year last aforesaid, acknowledged themselves, each jointly and severally, to be held and firmly bound unto the said United States

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NOTE.—The Exhibit accompanying the claim and intervention of J. P. Brogan will be found printed and indexed with the Bill of Exceptions.

of America, in the penal sum of twenty-five thousand dollars ($25,000.00), above demanded to be paid to the said claimant and intervenor, the said John P. Brogan; that a duly certified copy thereof is now here shown to the court and that the original of said writing obligatory is in the sole custody and possession of
79 the said United States and beyond the possession of this claimant and intervenor.

That the said The Standard Contracting Company was authorized by law and had the power to make the several agreements and covenants herein referred to, and that the said The National Surety Company was organized for the purpose of, and with the corporate power, among other things, to engage in the business of surety for others, and that at the time of the grievances herein mentioned, it had the right to so contract, to be contracted with, and to sue and be sued, in the State of Michigan, and in said Western District of Michigan, by virtue of the laws of the State of Michigan and the Acts of Congress.

This claimant and intervenor further alleges that on, to-wit, the 12th day of August, 1908, the said The Standard Contracting Company made and entered into a formal contract in writing with the United States of America, to furnish all of the labor and materials, and to do and perform all of the work required for the construction and "Dredging Hay Lake and Neebish Channels in St. Marys River in Michigan," in the said Western District of Michigan, in strict accordance with the requirements of said contract and of certain drawings, plans and specifications, which were referred to therein, and to furnish, as aforesaid, all of said labor and materials according to certain written specifications attached to and made a part of said contract, as required for dredging at Section 4, Item R, Hay Lake and Neebish Channels in St. Marys River in Michigan, all for a certain sum of money therein specified and stated, a duly certified copy of which contract and specifications, plans, drawings and the proposal therefor, and all other papers going to make up said contract, has been duly filed with said court, and that the original of the same is in the sole possession of the United States and beyond the possession of this claimant and intervenor.

This claimant and intervenor further alleges that before the commencement of the work under said contract, The Standard Contracting Company, as principal, and The National Surety Company, as surety thereon, executed and delivered the aforementioned bond and writing obligatory to the United States of America, according to the Acts of Congress, in such case made and provided;
80 and the claimant and intervenor further alleges that said writing obligatory contained covenants and conditions by the terms of which said The Standard Contracting Company bound itself to promptly make full payments to all persons supplying it labor and materials in the work provided for in said contract, and that if said The Standard Contracting Company should promptly make full payments to all persons supplying it labor and materials in the work provided for in said contract, then the said obligation should be void, otherwise to be and remain in full force and virtue.

This claimant and intervenor further alleges that afterwards, to-wit, between April 20th, 1910, and June 23, 1911, said John P. Brogan, at the special instance and request of the said The Standard Contracting Company, furnished, sold and delivered to said Standard Contracting Company, for use in the said contract, a large quantity of groceries and supplies, at certain prices then and there agreed upon between them, which said groceries and supplies were reasonably worth the prices then and there agreed upon,—the agreed prices for all of said material amounting in the aggregate to forty-six hundred and thirteen dollars and eighty-seven cents ($4,613.87), and that the said The Standard Contracting Company then and there promised to pay to said John P. Brogan said sum of money for said groceries and supplies, an itemized account of said groceries and supplies being hereto attached, made a part hereof and marked "Exhibit A."

Said claimant and intervenor alleges that said material was sold and delivered for the purpose of being used on said work and was actually used and consumed in the prosecution of such work provided for by the contract between the Standard Contracting Company and the United States above referred to.

That there now remains unpaid of said sum agreed to be paid for said groceries and supplies the sum of forty-six hundred and thirteen dollars and eighty-seven cents ($4,613.87), that said The Standard Contracting Company agreed to pay for said groceries and supplies, so furnished, within sixty (60) days after the same was delivered; that said material was sold and delivered on the dates stated in the account hereto attached, and that there is due the intervenor from said The Standard Contracting Company
81 and The National Surety Company the sum of forty six hundred, thirteen dollars and eighty-seven cents ($4,613.87), with interest from the 23rd of June, 1911; that said John P. Brogan is one of the persons comprehended and included in said bond and the covenants and conditions therein contained above referred to, by reason of the furnishing of said groceries and supplies, and is within said terms and conditions and is entitled to the protection and security afforded by said bond; that the said The Standard Contracting Company has completely performed the work required to be done under said contract, and final settlement of said contract has been had and that the date of final settlement and completion of said contract and the final payment thereon by said United States of America to the said The Standard Contracting Company was on, to-wit, the 12th day of July, 1912, and all of the said money earned on said contract has been fully paid and more than six (6) months have elapsed since the date of final settlement and completion, and said John P. Brogan, by virtue of the Acts of Congress in such case made and provided, and of the said bond, and of the furnishing of said groceries and supplies, and the failure to pay for same, said account being long past due and by reason of the premises herein contained, said John P. Brogan is well entitled to have of, and from the said defendants the said sum of money aforesaid, and to have and maintain this action, claim and

intervention upon the said writing obligatory for the said sum of money against the said defendants for the recovery thereof, and he files his said claim herein by virtue of the Acts of Congress in such case made and provided, and the specifications and details thereof are appended hereto, marked "Exhibit A" and made a part hereof; that no suit or proceeding has been brought by any other person on said bond except The Pittsburgh & Buffalo Company by this instant suit now at bar, and that there has been obtained the necessary order of this court permitting this claimant and intervenor to file his claim and intervene herein, according to said Act of Congress, said Act being the Act of February 24, 1905, Chapter 778, 32 Statutes at Large, 811, entitled: "An Act to Amend an Act approved August 13, 1894, entitled 'An Act for the protection of persons furnishing labor and material for the
82 construction of public works,' which Acts are now here pleaded by this claimant and intervenor.

The said claimant and intervenor avers that more than six (6) months have elapsed since said completion and final settlement aforesaid, but less than a year has elapsed since said final settlement and completion, and that the said John P. Brogan is well entitled to file and maintain this claim and action, and the said John P. Brogan has many times requested since said final settlement and completion of said contract payment of said sum of money due to him by defendants, yet said defendants have disregarded their said covenants in said bond contained, and other promises of payment therefor made to the said J. P. Brogan, and have not paid said sum of money, or any part thereof, and by reason of the premises said John P. Brogan, this claimant and intervenor, and said plaintiff, for the use of said John P. Brogan, has sustained damages to a large amount, to-wit, forty-six hundred, thirteen dollars and eighty-seven cents ($4,613.87), with interest from June 23rd, 1911, whereby an action hath accrued to the said plaintiff for the use and benefit of the said John P. Brogan, and also to John P. Brogan by reason hereof, to demand and have of, and from the said defendants the sum of forty-six hundred, thirteen dollars and eighty-seven cents ($4,613.87) above demanded. Yet the said defendants, although often requested to do so, hath not as yet paid as aforementioned the said sum or any part thereof to the said plaintiff for the use and benefit of said John P. Brogan, nor to said John P. Brogan, but hath hitherto wholly neglected and refused so to do, and still neglects and refuses so to do, to the damage of the said plaintiff for the use and benefit of the said John P. Brogan, and also to the damage of John P. Brogan, in the sum of forty-six hundred, thirteen dollars and eighty-seven cents ($4,613.87), and therefore J. P. Brogan files his said action and intervenes herein for the recovery thereof, etc.

E. S. B. SUTTON,
Attorney for J. P. Brogan, Claimant and Intervenor.

Sault Ste. Marie, Mich.

83–100 *Amended Plea. Filed Nov.* 28, 1913.

Now comes defendant, the National Surety Company, by Tolles, Hogsett, Ginn & Morley, its attorneys, and demands a trial of the matters and things set forth in the intervening declaration of John P. Brogan.

C. F. BUTTON AND
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendant National Surety Company.

John P. Brogan, Intervenor:

Notice.

[NOTE.—The within notice of National Surety Co. to intervention of J. P. Brogan is exactly the same, except as to parties, as the notice to Pittsburgh & Buffalo Co., appearing on page 17, and is accordingly omitted.]

C. F. BUTTON AND
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendant National Surety Company.

We hereby acknowledge receipt of copy of the within amended plea and notice this 25th day of November, 1913.

CLINE & MINSHALL,
Attorneys for John P. Brogan.

* * * * * * *

101 *Judgment.*

(Entered Jan. 17, 1914, by Judge C. W. Sessions.)

This cause having come on to be heard before the Court upon the pleadings and proofs of the parties thereto and having been argued by counsel and submitted, it is found by the Court that the United States has no claim in its own right in this cause under the bond upon which this suit is brought, and that it is entitled to recover herein of and from the said defendants, The Standard Contracting Company, and its surety, The National Surety Company, the full sum of the penalty of said bond, to-wit: $25,000.00, for the use and benefit of the Pittsburgh & Buffalo Company and the intervenors herein, whose claims are allowed at the amounts set opposite their respective names, as follows:

Pluto Powder Company	$5747.65
M. A. Hanna & Co.	3517.99
The Pittsburgh & Buffalo Co.	3726.83
W. M. Pattison Supply Co.	2933.17
Upson-Walton Co.	789.95
J. P. Brogan	4121.21

George Kemp	2425.98
Soo Hardware Co.	271.85
The George Worthington Co.	1465.37
	$25000.00

It being further found that the full amount of claims so allowed is in excess of the penalty of said bond and that the amounts herein stated as allowed to each claimant is 89.32 per cent of the full amount found to be due to each claimant respectively.

102–109 It is found that the intervenor, Cleveland Steel Castings Co., is not entitled to recover in this action upon said bond, and it is ordered that said intervenor take nothing by its said intervention.

It is found that the intervenor, David Helman, is not entitled to recover in this action upon said bond and it is ordered that said intervenor take nothing by its said intervention.

It is therefore ordered and adjudged that the said plaintiff, The United States, for the use and benefit of said intervenors whose claims have been allowed, do have and recover of and from the said defendants, The Standard Contracting Company, and the said National Surety Company, the said sum of $25000.00 for its damages herein and that it do also have and recover of and from the said defendants for the use and benefit of the said intervenors whose claims have been allowed the costs and charges of each of the said intervenors so recovering herein to be taxed, and that the said United States have execution of this judgment.

* * * * * * *

110–118 *Bill of Exceptions.*

Filed April 3, 1914.

Be It Remembered, that on the trial of the above entitled cause in the District Court of the United States for the Western District of Michigan, Northern Division, at the October Term thereof, to-wit, on the 14th, 15th, 16th and 17th days of January, 1914, before the Honorable Clarence W. Sessions, Judge of said Court, without a jury the following proceedings were had:

Appearances:

E. S. B. Sutton, Esq., appeared generally for Pittsburgh & Buffalo Company and all intervening claimants except Soo Hardware Company and George Kemp;

L. C. Spieth, Esq., for The Cleveland Steel Castings Company and The Upson-Walton Company;

Mark A. Copeland, Esq., for Pittsburg & Buffalo Company and the defendant, The Standard Contracting Company;

John A. Cline, Esq., for J. P. Brogan;

Frederick C. Slee, Esq., for Pluto Powder Company;

B. H. Davis, Esq., for The W. M. Pattison Supply Company;
John W. Shine, Esq., for Soo Hardware Company and George Kemp;
John M. Garfield, Esq., for the firm of Tolles, Hogsett, Ginn and Morley, together with C. F. Button, Esq., and Chas. H. Burras, Esq., for the defendant National Surety Company.

* * * * * * *

119 MARK A. COPELAND a witness produced, sworn and examined on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Sutton:

I reside in Cleveland, and am an attorney. I know Mr. James Cassidy. He is receiver for The Standard Contracting Company, under an order of the United States District Court for the Northern Division of Ohio. I am acquainted with the defendants National Surety Company and The Standard Contracting Company. I know that a contract existed between the United States and The Standard Contracting Company relative to certain work in the St. Mary's River. I am Mr. Cassidy's law partner, and since he was appointed receiver for The Standard Contracting Company I have worked with and been associated with him to a large extent in the administration of the receivership in connection with the completion of the company's contract. Immediately after the appointment of the receiver he authorized me to come to this district and arrange for the completion of the contract and get the plant in shape for operation. I came here and negotiated with material men for the purchase of supplies, repairs and equipment preparatory to going forward with the contract. The receiver completed the contract on the 5th day of July, 1912. Final settlement was made on August 3, 1912.

Thereupon Mr. Sutton offered in evidence certified copy of contract between the United States of America and The Standard Contracting Company, together with certified copy of the bond given by National Surety Company, and attached to the contract said papers referred to, marked "U. S. Exhibit No. 1."

Q. In what district of the United States is Hay Lake and Neebish, the improvement as mentioned in this contract, with reference to this Court?

A. In this district, in the Northern Division. W. C. Jones was president and Thomas Robinson, secretary of The Standard Contracting Company. The superintendent on the job was Leander T. Brogan. He was superintendent both for The Standard Contracting Company and the Receiver. The Standard Contracting
120–178 Company is still a corporation, and Messrs. Jones and Robinson still held their respective offices at the time of the appointment of the Receiver.

Cross-examination.

By Mr. Garfield:

Payment was made by check. I received the check of the engineer drawn on some sub-treasury. I remember when I received the final estimate and when I received the check for and on behalf of the Receiver; it was upon the 3rd of August, 1912. I do not know whether the officers of The Standard Contracting Co. that signed this bond were authorized to do so by proceedings or resolution of the Board of Directors or not.

Redirect examination:

The check was accepted by the Receiver as payment of the balance due upon that contract and in settlement and completion of the same.

Mr. Sutton: If your Honor, please, we will offer to introduce proof of publication and proof of service of your Honor's order. I thought it went in this morning.

Mr. Garfield: I presume it did. My objection was made and your Honor's ruling has overruled my objection.

The Court: I think Mr. Garfield is right about it. It will be admitted in evidence.

Mr. Sutton offered in evidence proof of publication to be marked "U. S. Exhibit No. 2."

* * * * * * *

179 *J. P. Brogan Groceries Claim.*

Mr. Cline: The next claim is a claim of Mr. J. P. Brogan, a grocer. When the contract was taken, Mr. Brogan a grocer, in Cleveland, who had furnished groceries to shipmen generally, and doing a retail and wholesale business, was solicited by The Standard Contracting Company to furnish groceries and supplies at the Soo. It was impossible for the company to obtain men or places to quarter their men at the Soo because of the character of the country. The Soo was the nearest city and being twenty-four miles away—the two Soos. And the labor unions furnished workers and insisted that men should be boarded. A part of the contract with the men themselves was that they should be boarded, except that perhaps five or six men who lived in the vicinity, all they could get there, who were allowed twenty-two dollars and a half a month, the rate provided by the union scale for men who boarded themselves, and the company deducted from the men's wages, twenty-two dollars and a half a month for the board, and the company ordered the groceries and supplies directly from Mr. Brogan at Cleveland, who shipped them to the Soo, and the claim is now made for the provisions which were sent from Mr. Brogan to the comupany, contracted for by the company from Mr. Brogan. That in substance is the claim.

Thereupon Mr. Cline read the deposition of L. T. BROGAN, as follows:

My name is L. T. Brogan. I am not related to J. P. Brogan, grocer, of Cleveland. I was superintendent for the Standard Contracting Company at the time they had the government contract on the Neebish Channel in the Soo River. We were to dredge and deepen the channel at Sailors' Encampment, which is about twenty-four miles below the Soo. The country about Sailors' Encampment is farming country. The nearest town or village is the Soo, twenty-four miles away, and that is the only town near there. Between April, 1910, and July, 1911, while working on this job, we employed on an average about eighty men. We ran from 20 to 110 men. The Standard Contracting Company furnished board for these men.
180 They had to do it; there was no other way. We couldn't find quarters for the men around there; there were no boarding houses or hotels. We had our own tents and boarded our men, about half of them in camps and the other half on the dredges. We made arrangements with the labor unions, under which we were to board the men who worked on the dredges. As part of the contract with the men up there we were to board them as a part of their wages, and that is what we did. The company ran the boarding house and furnished board to the men and bought groceries and supplies directly, most of them from J. P. Brogan of Cleveland. The groceries were shipped directly to the company at the Soo, and I received most of them.

Q. I show you paper, which may be marked Brogan Exhibit 1, and ask you to look at that and say whether you received it?

A. (Examining paper.) I would say no to this.

Q. You don't know anything about Exhibit 1?

A. No, sir.

Thereupon papers produced by counsel for J. P. Brogan were marked by the Commissioner J. P. Brogan Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, inclusive, and the same are attached hereto and made a part hereof the same as if set forth at length herein.

The witness thereupon examined Exhibits 2 to 21, both inclusive, and stated:

The items mentioned in these exhibits 2 to 21, both inclusive, were received by The Standard Contracting Company and were used up and wholly consumed in the prosecution of the work. The Standard Contracting Company had charge of buying the groceries and provisions for the Sailors' Encampment. I used to give the order for what we wanted. I had nothing to do with the prices. We bought stuff at the Soo also and paid higher prices there than what we paid to have them shipped up from Cleveland. That is why we bought them in Cleveland. The company purchased groceries for this work because they couldn't do the work without groceries. The men couldn't work without eating. They had to feed the men for two reasons; first, the unions compel them to; and second, because there

was no other place for them to stay up there. The company
181 has to furnish them board. It was part of our agreement as to the price to be paid to the men that the company would board them. The camps are built in the shape of houses—several of them—some to sleep in, and one in particular for a dining room. We had a regular storeroom there to keep provisions in. This boarding house was run directly by the company. They bought all the provisions and fed the men. As I said before, we had to do it to get the men to work there, and besides we had made arrangements with the union to furnish them their grub. Another reason is that we couldn't do the work without them. There were no other boarding houses to take care of them.

Q. Supposing, Mr. Brogan, the company had not run a boarding house there and furnished provisions for these men, would it have been possible to secure men to work on the job?

Mr. Garfield: I object to the question as calling for an opinion and being a hypothetical question.

Mr. Garfield: (Upon the reading of the objection.) I think the objection is well taken.

The Court: The objection is overruled.

Mr. Garfield: Note my exception.

A. Well, we couldn't have done the work without feeding them.

Mr. Garfield: I move that the answer be stricken out.

I ordered the provisions as to the quantities we wanted by letter to The Standard Contracting Company's general office, and they would ship them to us by boat. They came to the Soo by the Anchor Line, and down to the Sailors' Encampment by a little boat that made daily trips. We had a set of bills and checked them up in the storeroom, and then they were checked out of the boxes by a man named Brown. It was my business to acknowledge receipt of the goods, and I did in all cases except Exhibit No. 1. The provisions were wholly consumed in the work. If we had not received them, we couldn't have done the work. They were all used up by The Standard Contracting Company in performing the digging or dredging of the Neebish Channel at Sailors' Encampment at the Soo.

182 Cross-examination.

By Mr. Garfield:

I know I received Exhibits 2 to 21, inclusive, because I checked them at the time and placed my signature on the invoices. That is the reason I have for saying now that they were received. There are a very few farm houses around the Sailors' Encampment. Some of the men boarded themselves at home over in Canada and walked two, three or five miles from the job and back. If a man boarded himself he got more money than if we boarded him. The rate which we paid them took into consideration the fact that we boarded them. The union rules provide that if you don't board them you have got to allow them so much per month extra. It used to be

$22.50 per month in addition to their wages. We had to board them or pay for it. The union stipulated that, and the men got what the union stipulated. I suppose there were between five and ten men who boarded themselves. They came from Canada and around there. When I said that this material was all consumed in the prosecution of the work I meant that the men ate the food. We had a written contract with the union; Mr. Robinson or the company have it. It refers to all work—government or otherwise.

Redirect examination.

By Mr. Cline:

I would say there were five or ten men who boarded themselves most of the time. They lived at home, from one to five miles away.

Thereupon counsel for intervenor J. P. Brogan offered in evidence exhibits marked J. P. Brogan Exhibits 1 to 21, both inclusive.

Mr. Garfield: I object to Exhibits 1 to 21 for the following reasons: As to Exhibit 1, Mr. Brogan testified he doesn't know whether he received it or not. And I object to all the exhibits from 1 to 21, both inclusive, on the ground that they are for food furnished to men who worked on the job, and are not for material which went into the work.

Mr. Garfield: (Upon the reading of the deposition.) I want to add to that: Property included in a claim under the Act of Congress under which this proceeding or this case is brought.

The Court: Just pass the matter until the conclusion of the testimony.

183 Thereupon Mr. Cline read the deposition of THOMAS ROBINSON, as follows:

Direct examination:

I am secretary and purchasing agent of The Standard Contracting Company. We bought groceries from J. P. Brogan for our contract at Neebish Channel. Exhibits 1 to 21, inclusive, were a part of the company's record book. Referring to Brogan Exhibit 1, there is an entry in the journal "Soo Contract, $131.52."

Q. What does that entry mean? It hasn't any meaning to me.

A. It says that $130 worth of provisions were sent to the Soo contract.

Q. Now, I will show you Brogan Exhibit 1 and ask you if the item on page 133 of your journal which you have just read refers to the items mentioned in Brogan Exhibit 1?

A. (Examining book.) It does. The goods were ordered by me or by my instructions, and their being entered in the journal indicates that they were received by the company. They wouldn't be entered unless they had been received. The goods included in Brogan Exhibits 1 to 21 were ordered by my company—either by me or under my direction. I have been the company's purchasing agent

for fifteen or twenty years. I am familiar with the prices of groceries, and the prices of these goods were reasonable market prices and cheaper than we could get them elsewhere. We ordered these goods of J. P. Brogan because we needed them at the Soo and could get them from him cheaper than at the Soo. They were used to feed the men at the Soo, because we had to keep them there. There was no other place to keep them. Their work was located in the woods and it was part of the remuneration of the men for their work. I have been to the place where the work is carried on, and it is a barren wilderness—a place where you can go and shoot a deer in the winter and you can fish all you mind to in the summer. It is a barren place. There are no houses near and no provisions for the men at all. Men have to be brought from the Soo and other places in order to go to work there. If we did not feed the men it would not be possible to carry on this work. The village nearest to the work is the
184 Neebish, less than five miles away. The nearest is up in the country about three miles. In employing men for this contract our arrangement as to boarding them was part of their pay, their board and so much a day. If we hadn't boarded them it wouldn't be possible to secure laborers and men for the job. It is a part of the union scale to board and pay so much a month, and we conformed to that agreement. We employed union men there.

Cross-examination.

By Mr. Garfield:

I have not the union contract with me, but I am familiar with its terms and the union scale. There were some men working on the job that didn't board there—a few of them, I believe. We paid these men a higher rate of wages for the same work—that is, we deducted the feature of board. If they boarded themselves they were paid their board.

Q. Now, how about the barren wilderness? There are some farms within three or four miles of that place where the work was done, are there not?

A. Oh, yes.

Q. And the Neebish is how big a village?

A. Well, a few hundred, I guess.

Q. How many?

A. A few hundred people lived there. I don't know how many.

Q. And there are some men who worked for you who came from the Neebish every day?

A. Well, not from the Neebish—from West Neebish.

Q. Yes, from West Neebish. So the wilderness was pretty well cultivated and populated?

A. Well, it just depends upon your idea of cultivation.

Q. Or population?

A. Or population.

Q. Did those invoices include freight?

A. No, sir.

Q. Referring to Brogan Exhibit 1, I wish you to examine that, Mr. Robinson, and I will ask you if you find any evidence on that invoice that the goods therein described were received at the Sailors' Encampment?

A. (Examining paper.) There is no evidence on the in-
185 voice there, only that it is marked by the bookkeeper "Soo Contract."

Q. The bookkeeper was located in Cleveland?

A. He was.

Q. Then how do you dare to testify that those goods were received at the Sailors' Encampment?

A. Because he had proof of it, I suppose, either by the freight receipt, or knowledge from the superintendent, which doesn't appear here.

Q. Your testimony, then, is based upon your supposition of your bookkeeper's knowledge, is it not?

A. Well, my supposition is based on the fact that this never would have been entered if it were not correct.

Q. You know it wouldn't have been done if it wasn't correct, and that is all you know about that?

A. Well, I only know it was entered there correctly.

Q. You are willing to swear to that, whether you know it was or not?

A. No, I am not willing to swear to that whether I know it was or not.

Q. Do you know anything more about the delivery of any of the other things there?

A. Nothing more than the receipt.

Q. And if you had heard Mr. Brogan testify this morning that he didn't know whether that invoice, Exhibit A, was received at Sailors' Encampment or not, would you still say you knew it was delivered?

A. Well, I know it wouldn't have been entered in our books unless it were.

Q. Then your knowledge is purely argumentative?

A. Well, it is purely a business man's knowledge.

Mr. Garfield: That is all, Mr. Robinson.

Thereupon Mr. Cline read the deposition of JOHN P. BROGAN, as follows:

Direct examination:

My name is John P. Brogan. I am a wholesale and retail grocer,
with place of business at Cleveland, Ohio. I have done some
186 business with The Standard Contracting Company with reference to its contract with the Government near the Soo. (Examining Brogan Exhibits 1 to 21, inclusive.) These were all ordered from us by The Standard Contracting Company. I superintended the handling of them—that is, having the orders put up and having

them delivered to the depots for shipment, and I put them in charge of the Anchor Line Steamship Company and received their receipt.

Q. Now you may state whether you received any acknowledgment from the company that these goods were received—that is, by The Standard Contracting Company—that these goods were received by them?

A. Yes, these goods were all received by The Standard Contracting Company.

Q. How?

A. Yes, sir. The prices charged for the goods were all reasonable market prices. I have not received payment for the items mentioned in these invoices, and there is due and owing me from The Standard Contrac-ing Company, without interest, $4,613.87.

Cross-examination.

By Mr. Garfield:

I didn't put the goods up myself. I was right there and assisted in putting them up. My employes did the work. Our teamster delivered them to the Anchor Line.

Q. So you have no knowledge personally of whether they were delivered finally to The Standard Contracting Company at the Soo or not, have you—your personal knowledge?

A. Well, not by being there and seeing them delivered there, no. We sold them goods at jobbing prices. We always did sell to them at a jobbing rate—that is, wholesale rates. We always gave them wholesale rates, and those are the rates at which the goods are charged to them. I am no relation to L. T. Brogan.

Q. Referring to what is known as Brogan Exhibit 1, the first invoice that you have there before you——

A. Yes, sir.

Q. —what evidence have you, Mr. Brogan, and how do you know that those goods shown by that Exhibit 1 were delivered to The Standard Contracting Company, at the Soo, or elsewhere?

A. Well, they were shipped out and——

187 Q. Is there anything on that invoice to show that they were shipped out?

A. There is nothing on here, that I can see, to show that they were shipped.

Q. And how do you know that they were shipped out, that particular invoice, I mean?

A. Well, I am satisfied they were shipped out because——

Q. You believe they were shipped out?

A. Yes, sir.

Mr. Cline: Finish your answer, Mr. Brogan. You are satisfied they were shipped out because what?

The Witness: Because they are charged, and there was an order made out for them, and they were put up and sent out.

Q. You don't know that they were not dumped in the lake somewhere between here and the Soo, do you?

A. No, I couldn't tell that.

Q. You don't know that they may not have been delivered to The Standard Contracting Company at some other place than the Soo, do you?

A. Well, I presume I would have heard from them if they hadn't received their goods. Of course, they received their invoice, and they also received a receipt from the transportation company.

Mr. Garfield: That is all, Mr. Brogan.

Redirect examination.

By Mr. Cline:

Q. You received a receipt from the transportation company for the goods?

A. Yes.

Q. And no complaints were ever made that they were not received?

A. No, sir. We always sent to The Standard Contracting Company a copy of the freight receipts.

Q. And did they acknowledge receipt of these goods to you later on?

A. Why, no, not in any way any more than after getting the receipt, the freight receipt, of course, there was nothing further said.

Mr. Cline: That is all, Mr. Brogan.

Mr. Garfield: That is all.

188 Mr. Garfield: Now, I object to the testimony and allowance of Brogan Exhibits 1 to 21, both inclusive, on the ground I stated before, that they were not material furnished in such a way as to come within the purview of the statute under which this suit was brought; and the further ground that the testimony has not proved the delivery of these goods to the Soo.

(Mr. Garfield argues objection.)

SATURDAY MORNING, January 17, 1914.

The Court: Mr. Cline, I do not believe that it is necessary for you to make an argument in this matter. After a somewhat extended and careful examination of your brief, as well as the brief of counsel upon the other side, and an examination of all of the authorities which have been cited and which are available, I have reached a conclusion favorable to you and your client.

It must be conceded that the claim of Mr. Brogan presents greater difficulties and more perplexing questions than the claims that have preceded it in this trial. It certainly is within the zone of ambiguity and uncertainty. It is within that zone, I think, where the allowance or disallowance of the claim must depend upon the peculiar circumstances surrounding it. Counsel have exercised great diligence and industry, and their industry does not seem to have discovered any

authority directly in point. Counsel for the Surety Company cited two cases in the Federal courts, one of which is reported in Volume 66 of the Federal Reports and which clearly does not apply to the facts of this case. While that was an action brought under the statute here in question, or rather the original statute before the amendment, yet the lien which was discussed in that case was a lien under a statute of different wording from the statute in question, and hence the case is not of direct application.

More than that, I am satisfied that if the Federal court were called upon to pass directly upon the question which is there raised indirectly, a decision would be the other way.

A case more nearly in point is reported in Volume 93 of the
189 Federal Reporter. That case is distinguishable from the present one and clearly so. The language of the court in that case and in a subsequent case refers to it, to the fact that it was the duty of the contractor to have paid the wages of his laborers and permitted them to have their board and clothing wherever they chose. It must be considered, in view of the peculiar circumstances of the case itself. It appears that in that case the claim was presented by a boarding house keeper, who had made contracts directly with the laborers, and also entered into a contract with the contractor by virtue of which the latter guaranteed the payment of the board. The court held that the surety on the contractor's bond was not liable under those circumstances; that there was no direct contract with the contractor, but rather—that is, for the supplying of the board, but rather a contract or guarantee, which clearly would not be within the purview of the bond and could not be passed as a material or labor supplied in the prosecution of the work.

Here we have a very different state of facts and very different conditions surrounding the prosecution and performance of this work. It appears that the work was being prosecuted and performed in a sparsely settled community where there were no boarding houses, no hotels, at a distance from the base of supplies, and where it was impossible to obtain board for the men who were performing the work except in the way of supplying it by the contractor itself. It appears, too, that under the contract of hiring the contractor was obliged to board the men, and that it was impossible to obtain board for the men in what may be called the usual and ordinary way by having them board at a boarding house or hotel. Under those circumstances the contractor purchased from this claimant groceries and provisions which were used and consumed in its boarding house, consumed by the men; clearly used in the prosecution of the work of the contractor, and clearly consumed in the prosecution of the work of the contractor.

The surety is bound to knowledge of the facts and circumstances and conditions surrounding this work and its performance; that is, the general conditions and general facts and general circumstances, and cannot be heard to plead ignorance of such facts and circumstances as here existed; and those facts and circumstances must be presumed conclusively to have been within the contemplation of the
190–211 parties when this bond contract was entered into. There is no difference in principle between furnishing supplies

of this character, groceries and provisions, to be consumed by the men working upon a contract in the performance of the contract, than there is between this and the furnishing of coal for the running of the dredges and the drills and the boats, tugs, and in the performance of the work generally. There certainly is no difference in principle between supplies of this character and lubricating oil that may be used upon the machinery and which is consumed and is not so used for the preservation of the machine itself. And there is no difference between furnishing food for men who are working for the contractor and food for animals that may be employed; and if this contractor had seen fit, or if it had been practicable to use mules or horses or other animal power in propelling his dredges and drills and operating its dredges, instead of steam, there would not be any question but what the hay and feed consumed by the animals would come within the purview of the bond; and I can see no difference in principle between food consumed by the men who were working on the contract and food that may be consumed by animals that are used in the place of steam power, and, therefore, while there is no adjudicated case upon this direct proposition, and it is perhaps within the twilight zone, yet it is within the principle of all of the leading cases, and the claim will be allowed at its face and an exception will be noted. Allowed at the sum of $4,613.87. It will be understood, Mr. Garfield, with reference to every particular claim, that you will be given an exception where the ruling is against you.

* * * * * * *

212 & 213 *Findings of Fact and Conclusions of Law.*

The Court thereupon announced:

The findings of fact and the conclusions of law in this case, in substance, will be as follows:

* * * * * * *

214 Seventh. The claimant, J. P. Brogan, sold and delivered to the defendant, The Standard Contracting Company, groceries and provisions of the value of $4,613.87. The evidence shows that the public work under construction by defendant was located in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses and The Standard Contracting Company was compelled to provide board and lodging for its laborers. The groceries and provisions furnished by this claimant were used by said defendant in its boarding house. They were supplied by said claimant to said defendant in the prosecution of the work provided for in the contract and the bond upon which this suit is based. They were necessary to and wholly consumed in such work.

* * * * * * *

215 Twelfth. The materials supplied by the several claimants above mentioned to the defendant, The Standard Contracting Company, which were used and wholly consumed in the prosecution

of the work covered by the contract and bond here in controversy, were of the aggregate value of $27,988.22. The penalty of the bond in suit is $25,000.00, which is approximately 89.32 per cent of $27,988.22.

216 *Conclusions of Law.*

First. The claimant, Pluto Powder Company, is entitled to a judgment against both defendants for the sum of $5,747.65, such sum being 89.32 per cent of its allowable claim ($6,434.79).

* * * * * * *

Seventh. The claimant, J. P. Brogan, is entitled to a judgment against both defendants for the sum of $4,121.21, such sum being 89.32 per cent of his total allowable claim ($4,613.87).

* * * * * * *

217–234 Twelfth. The claimants are entitled to recover from the defendants their costs of suit to be taxed.

Judgment will be entered accordingly.

* * * * * * *

235 BROGAN EXHIBIT 1.

CLEVELAND, O., April 20, 1910.

The Standard Contracting Company,
Sault Ste. Marie, Mich.

Bought of J. P. Brogan, Grocer,
1386-1388 West 25th St.

20 lbs. tea	at	.20	4.00
30 lbs. coffee		.13½	4.05
50 lbs. bulk salt		....	.25
2 30-lb. pails jelly		1.10	2.20
2 cases 4 doz. cans tomatoes		.75	3.00
4 cases 8 doz. cans peas		.75	6.00
2 cases 4 doz. cans corn		.80	3.20
2 cases 4 doz. cans string beans		.60	2.40
4 cases 8 doz. cans peaches		1.35	10.80
4 cases 8 doz. cans pears		1.00	8.00
5 gals. table syrup		.33	1.65
236 2 bbls. sup. flour		6.40	12.80
20 lbs. rice		.04½	.90
10 lbs. barley		.03½	.35
20 lbs. tapioca		.04½	.90
25 lbs. broken macaroni		.04	1.00
10 lbs. bulk vermicella		.06½	.65
1 box 36 lbs. raisins		.05¾	2.07

1 box 36 lbs. currants	.08¼	2.97
1 bbl. 48 lbs. soda crackers	.07	3.36
2 boxes 82 lbs. ginger snaps	.07	5.74
2 boxes 44 lbs. oatmeal crackers	.08	3.52
2 cheese 67 lbs	.17	11.39
1 box (100 cakes) Sailor soap	....	2.13
2 boxes com. mot. soap	2.25	4.50
6 scrub brushes	.90	.45
6 pkgs. tooth picks	.30	.15
154 lbs. hams	.18½	28.49
2 cases 4 doz. pint Bos. catsup	.90	3.60
		$130.52

BROGAN EXHIBIT 2.

CLEVELAND, O., May 19, 1910.

The Standard Contracting Co.
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

A red stamp appears on page reading as follows:
Charge to —— ——.
Prices correct, G. G. D.
Extension correct, O. P. S.

Material received—

400 lbs. gran. sugar		5.55	22.20
50 lbs. tea		.20	10.00
100 lbs. coffee		.13½	13.50
1 doz. 10c. jars mustard		..	.90
2 lbs. grd. ginger		.12	.24
2 lbs. whole nutmegs		.20	.40
10 lbs. blk. pepper		.11½	1.15
2 lbs. cinnamon		.16	.32
2 lbs. allspice		.12	.24
	50 lbs. codfish	.08½	4.25
237	6 ½ pint bots. vanilla ext.	1.60	.80
	6 ½ pint bots. lemon ext.	1.35	.67
24 lbs. inv. value b. powder		.10	2.40
2 boxes Yeast Foam (3 doz. each)		1.15	2.30
10 gals. plain pickles		.20	2.00
5 gals. sweet mixed pickles		.60	3.00
2 gals. catsup		.40	.80
2 pails jelly		1.00	2.00
4 cases 8 doz. cans tomatoes		.75	6.00
2 cases 4 doz. cans peas		.75	3.00
2 cases 4 doz. cans plums		1.35	5.40

2 cases 4 doz. cans corn	.80	3.20
3 cases 6 doz. cans strg. beans	.60	3.60
4 cases 8 doz. cans peaches	1.35	10.80
2 cases 4 doz. cans pears	1.00	4.00
4 doz. gal. cans apples	2.75	11.00
25 lbs. evap. apricots	.12	3.00
25 lbs. evap. peaches	.09	2.25
1 doz. gal. can pitted cherries	..	9.50
100 lbs. navy beans, 2.50 per bu.	..	4.17
50 lbs. lima beans	.05½	2.75
25 lbs. evap. apples	.08½	2.13
10 lbs. shrd. cocoanut	.12½	1.25
50 lbs. prunes	.04¾	2.38
25 lbs. raisins	.05¾	1.44
50 lbs. tapioca	.04¼	2.13
(Amount forward)		$145.17

Sheet 1, F. H. F.

(Same heading for this second sheet.)

(Amount forward)		$145.17
(Written with blue pencil on this sheet: "141".)		
50 lbs. rice	.04¼	2.13
50 lbs. rolled oats	.02¾	1.38
25 lbs. graham flour	.02½	.62
25 lbs. buckwheat flour	.03	.75
800 lbs. flour	6.40	25.60
2 bus. cabbage	1.40	2.80
2 bus. carrots	.75	1.50
2 bus. parsnips	.50	1.00
2 crates onions	1.65	3.30
2 bus. beets	.65	1.30
5 gals. molasses	.25	1.25
238 50 lbs. soda crackers	.07	3.50
50 lbs. ginger snaps	.07	3.50
51½ lbs. oatmeal crackers	.08	4.12
56 lbs. Waverly cookies	.09	5.04
360 lbs. butter	.22	79.20
54 lbs. salt pork	.17	9.18
180 lbs. lard	.12¼	22.05
69 lbs. Y. S. cheese (34-35 lbs.)	.16	11.04
146 lbs. hams	.18	26.28
150 lbs. bacon	.19	28.50
1 doz. deck brooms	..	4.50
1 doz. cabin brooms	..	4.50
½ doz. cotton mops	1.30	.65
3 mop handles	.90	.23
1 case Gold Dust	..	4.15

1 box com. mot. soap	..	2.25
1 doz. No. 2 lamp chimneys	..	.54
2 doz. No. 2 lamp wicks	.06	.12
50 bars Scourine	.03¾	1.88
1 box matches	..	.95
6 galv. pails	2.10	1.05
6 R. R. scrub brushes	.90	.45
2 doz. tin pie plates	.45	.90
4 doz. tea spoons	.20	.80
(Amount forward)		$402.18

Sheet 2, F. H. F.

(Same heading as on Sheet 1 and 2 of this exhibit.)
(Written with blue pencil on this sheet: "141".)

(Amount forward)		$402.18
2 doz. table spoons	.40	.80
2 doz. knives and forks	1.20	2.40
2 heavy carving knives	1.15	2.30
1 meat saw	..	.65
1 meat ax	..	.90
2 10-gal. coffee pots	6.25	12.50
2 oven pans, 24 x 30	2.50	5.00
2 soup ladles	.35	.75
2 water dippers	.08	.16
3 ball- twine	.05	.15
2 cases 4 doz. cans apricots	1.55	6.20
2 30-qt. dish pans	.85	1.70
239		
1 large flour sieve	....	.15
1 large flour scoop	....	.20
1 alarm clock	....	.75
1 doz. roller towels	....	2.50
1 doz. blankets	....	7.80
1 doz. pillow slips	....	1.50
4 bolts mosquito netting, white	.56	2.24
1 pair ice tongs	....	.50
½ doz. memorandum books	.40	.20
200 12 lb. paper bags	.20	.40
1 roll 29½ lb. wrapping paper	.03	.89
2 large enamel stew pans	.85	1.70
		$454.47

O. K., L. T. Brogan (except 20c. for memorandum book).

Sheet 3, F. H. F.

O. K., with exception of memorandum books. C. S. Brown.

BROGAN EXHIBIT 3.

CLEVELAND, OHIO, May 12, 1910.

The Standard Contracting Co.,
Sailors Encampment, Neebish, Mich.

Additions and extensions correct—J. M. D.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

Stamped on the face:

Charge to Soo. Ct.
Prices Correct G. G. D.
Extensions Correct O. P. S.
Material Received.

2 bbls. 711 lb. gran. sugar	5.45	38.75
50 lb. tea	.20	10.00
50 lb. coffee	.13½	6.75
1 lb. loose mustard	....	.12
1 lb. nutmegs	....	.20
5 lb. pepper	.11½	.58
6½ pint bot's vanilla ext	1.60	.80
6½ pint bot's lemon ext	1.34	.67
1 box yeast foam	....	1.15
5 gals. plain sour pickles	.20	1.00
½ bbl. 20 gals. vinegar	.12½	2.50
240		
2 30-lb. pails jelly	1.00	2.00
4 cases 8 doz. cans tomatoes	.75	6.00
4 cases 8 doz. cans peas	.75	6.00
4 cases 8 doz. cans corn	.80	6.40
4 cases 8 doz. cans string beans	60	4.80
4 cases 8 doz. cans peaches	1.35	10.80
4 cases 8 doz. cans pears	1.00	8.00
4 cases gal. can apples, Y. S.	2.75	11.00
25 lb. buckwheat flour	.03	.75
½ bbl. grah. flour, 98 lbs	4.50	2.25
50 lb. corn meal	....	.90
1 90-lb. sack rolled oats	....	2.45
100 lbs. rice	.04¼	4.25
100 lbs. tapioca	.04½	4.25
50 lbs. macaroni	.04	2.00
50 lbs. raisins	.05¾	2.88
50 lb. currants	.08¼	4.13
100 lb. prunes	.04¾	4.75
100 lb. evap. apples	.08½	8.50

100 lb. navy beans	....	4.17
25 lbs. dry split peas	.04	1.00
100 lbs. evap. apricots	.12	12.00
2 bbls. 101 lbs. soda crackers	.07	7.07
1 box 40 lb. ginger snaps	.07	2.80
1 box 26½ lb. oatmeal crackers	.08	2.12
Amount forward		$183.79

Check O. K. C. S. Brown.

Sheet 1, F. H. F.

(Heading for second sheet same as first) ("141" in blue pencil.)

Amount forward	....	$183.79
1 box lemon crackers	.08	1.76
1 doz. deck brooms	....	4.50
1 doz. cabin brooms	....	4.50
1 doz. cotton mops	....	1.30
6 mop sticks	.90	.45
1 case gold dust	....	4.15
2 boxes (200 each) snow flake soap	4.25	8.50
2 boxes com. mot. soap	2.25	4.50
1 case matches	....	.95
1 doz. galv. pails	....	2.10
6 scrub brushes	.90	.45
241		
3 doz. hotel cups and saucers	1.30	3.90
2 doz. vegetable dishes, 4 inch	.78	1.56
6 small milk pitchers	1.35	.68
6 large milk pitchers	1.75	.88
2 doz. soup bowls	.90	1.80
1 cook's flour sieve	....	.15
3 doz. sauce dishes	.36	1.08
2 doz. knives	.60	1.20
2 doz. forks	.60	1.20
2 doz. tea spoons	.20	.40
2 tubs 60 lb. butter	.22	13.20
		$243.00

O. K. L. T. Brogan.
Checked O. K. C. S. Brown.

Sheet 2, F. H. F.

BROGAN EXHIBIT 4.

Phones:
West 228.
Cuy. Cent. 5458.

CLEVELAND, OHIO, June 2, 1910.

The Standard Contracting Co.,
Sailors Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St., 2461-2465 Detroit Avenue.

Stamped on page:

Charge to —— ——.
Prices correct. —— ——.
Extension Correct, O. P. S.
Material received, —— ——.

16 ½ bbls. flour	6.20	49.60
8 tubs 224 lbs. lard	.12¼	27.44
8 tubs 240 lbs. butter	.22	52.80
202 lbs. hams	.18	36.36
58 lbs. salt pork	.18	10.44
2 bus. parsnips	.50	1.00
2 bus. onions	1.65	3.30
1 crate cabbage	....	1.65
1 case 4 doz. cans lye	.80	3.20
		$185.79

O. K. L. T. Brogan.
O. K. C. S. Brown.

242 BROGAN EXHIBIT 5.

Orders Promptly Attended to.

CLEVELAND, O., June 17, 1910.

The Standard Contracting Co.,
Sailors Encampment, Neebich, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies, 1386-1388 West 25th St. Vessel Trade a Specialty.

Phones:

Bell West 228.
Cuyahoga Central 5458.

Superlative Flour Makes the Best Bread.

Stamped:

Charge to —— ——.
Prices correct, —— ——.
Extension correct, O. P. S.
Material received, —— ——.

2 gals catsup	.40	.80
25 lbs. plain chocolate	.29½	7.38
1 doz. cans. Im. V. Bkg. Powder	....	2.40
30 lbs. baking soda	.05½	1.65
71 lbs. cheese	.16½	11.72
114 lbs. hams	.18	20.52
66 lbs. bacon	.20	13.20
8 ½ bbls. flour	6.20	24.80
1 crate cabbage	....	1.25
1 bus. onions	....	1.75
1 bus. parsnips	....	.50
1 doz. bots. mustard	....	.90
1 case 4 doz. cans salmon	1.45	5.80
½ bbl. sauerkraut	5.50	2.75
1 1-gal. enamel measure	....	.45
1 enamel funnel	....	.30
6 wash basins	1.60	.80
6 writing tablets	2.20	1.10
3 account books	.10	.30
		$98.37

O. K.
O. K. L. T. Brogan.
O. K.
O. K. C. S. Brown.

243 BROGAN EXHIBIT 6.

CLEVELAND, O., June 24, 1910.

Orders Promptly Attended to.

S. The Standard Contracting Co.,
Sailors Encampment, Neebish, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies, 1386-1388 West 25th St.

Vessel Trade a Specialty.

Phones: Bell, West 228. Cuyahoga, Central 5458.

Superlative Flour Makes the Best Bread.

Stamped:

Charge to Blue pencil on page "154."
Prices correct —— ——.
Extension correct —— ——.
Materials received —— ——.

400 lbs. gran. sugar	5.50	22.00
100 lbs. tea	.20	20.00
50 lbs. coffee	.13½	6.75
10 10-lb. sacks salt	.07	.70
16 ¼ bbls. flour	6.20	24.80
1 doz. bots. vanilla ext	....	1.60
2 gals. catsup	.40	.80
10 gals. sour mixed pickles	.50	5.00
4 doz. cans tomatoes	.75	3.00
8 doz. cans peas	.75	6.00
4 doz. cans corn	.80	3.20
4 doz. cans string beans	.60	2.40
4 doz. cans peaches	1.35	5.40
4 doz. cans pears	1.00	4.00
4 doz. cans plums	1.35	5.40
4 doz. cans apricots	1.55	6.20
1 doz. gal. cans apples	....	2.75
5 gals. N. O. molasses	.25	1.25
2 bus. onions	1.50	3.00
1 crate cabbage	...	1.30
25 lbs. raisins	.05¾	1.44
50 lbs. evap. peaches	.09	4.50
2 boxes 82½ lbs. ginger snaps	.07	5.78
1 box 26 lbs. oatmeal crackers	.08	2.08

	1 box 23 lbs. lemon crackers	.08	1.84
244	1 box 23 lbs. graham crackers	.08	1.84
	4 cases 120 doz. eggs	.22	26.40
2 whole cheese 70½ lbs.		.16½	11.63
1 case Gold Dust		...	4.15
1 case (200 cakes) white soap		...	4.25
1 case Com. Mot. soap		....	2.25
360 lbs. butter		.22	79.20
1 piece oil cloth 11 ft. 5½ in. by 15 ft.			
1 piece oil cloth 50 in. by 5 ft. 6 in.			
	23½ yards at 35c	...	8.23
			$279.14

O. K.
O. K. L. T. Brogan.

BROGAN EXHIBIT 7.

CLEVELAND, O., Aug. 4, 1910.

Orders Promptly Attended to.

Standard Contracting Co.,
Sailors Encampment, Neebish, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies, 1386-1388 West 25th St.

Vessel Trade a Specialty.

Phones: Bell, West 228. Cuyahoga, Central 5458.

Superlative Flour Makes the Best Bread.

273 lbs. hams		.18	49.14
200 lbs. gran. sugar		5.50	11.00
100 lbs. coffee		.13½	13.50
1 90-lb. sack rolled oats		....	2.60
30 lbs. cheese		.16	4.80
2 tubs (50 lbs. each) lard		.12	12.00
1 box 50 -lbs. raisins		.06¼	3.13
2 boxes 64½ Waverly cookies		.09	5.81
2 doz. cans pears		1.00	2.00
4 doz. cans apricots		1.55	6.20
4 doz. cans peaches		1.35	5.40
4 doz. cans peas		.75	3.00
4 doz. cans corn		.80	3.20
4 doz. cans string beans		.60	2.40
4 ½ bbls. flour		6.60	13.20
	4 28-lb. sacks salt	.18	.72
245	1 case Gold Dust	....	4.15
	1 crate 45 hds. cabbage	.05	2.25

8 doz. cucumbers		.50	4.00
2 bus. onions		1.50	3.00
1 doz. 10c. bots. mustard		....	.90
1 case matches		....	.95
1 doz. 2-lb. cans Inv. V. Bkg. Powder		....	2.40
1 box (200 cakes) white soap		....	4.25
1 box brown soap		....	2.25
1 case 4 doz. cans cond. milk		.85	3.40
			$165.65

O. K. L. T. Brogan.

O. K. with exception of 100 lbs. sugar. C. S. Brown (lead pencil).
Sugar received later, see Brogan letter (red ink).
100 lbs. sugar short 5.50 (red ink).
160.15 (red ink).

Stamp:
Charge to —— ——.
Prices correct —— ——, Jr. 175 (blue pencil)
Extension correct —— ——.
Material received —— ——.

BROGAN EXHIBIT 8.

CLEVELAND, O., Oct. 19, 1910.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.
Bought of J. P. Brogan, Grocer,
1386-1388 West 25th St.

Stamp:
Charge to —— ——.
Prices correct —— ——.
Extension correct —— ——.
Material received, L. T. Brogan.
Blue pencil mark middle of page "192."

2 sacks 180 lbs. oatmeal		.02¾	4.95
2 cases matches		.95	1.90
2 doz. bottles mustard		.90	1.90
200 lbs. Navy beans		.04½	9.00
210 lbs. butter		.22	46.20
20 ½ bbls. flour		6.00	60.00
296 lbs. hams		.18	53.28
107 lbs. bacon		.20	21.40
	97 lbs. salt pork	.18	17.46
246	300 lbs. lard	.12	36.00
	12 bots. lemon ext.	....	1.35
12 bots. vanilla ext.		....	1.60
101 ½-lb. cheese		.17	17.26

1 case 2 doz. cans cove oysters	.85	1.70
2 pails jelly	1.00	2.00
500 lbs. gran. sugar	5.30	26.50
2 bbls. 98 lbs. soda crackers	.07	6.86
2 boxes 58 lbs. grah. crackers	.08	4.64
2 boxes 59 lbs. Waverly cookies	.09	5.31
2 boxes 49 lbs. mixed co-kies	.09	4.41
2 bbls. apples, Kings	3.75	7.50
4 bus. onions	.70	2.80
4 bus. carrots	.75	3.00
20 bus. potatoes	.65	13.00
4 bus. beets	.75	3.00
4 bus. yellow turnips	.60	2.40
2 crates cabbage	1.40	2.80
1 bbl. squash	....	1.90
2 crates cucumbers	1.90	3.80
2 cases 8 doz. spiced herring	1.00	8.00
10 lbs. bulk cocoanut	.14	1.40
6 cases (180 doz.) eggs	.29	52.20
		$425.42

O. K. L. T. Brogan.
O. K. C. S. Brown (lead pencil).

BROGAN EXHIBIT 9.

CLEVELAND, O., Sept. 10, 1910.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.
Bought of J. P. Brogan, Grocer,
1386-1388 West 25th St.

100 lbs. rolled oats	....		2.75
6 doz. cans tomatoes	.85		5.10
1 roll 36 lbs. heavy paper	.03½		1.26
1 case 24 lbs. Waverly cakes	.09		2.16
1 case 18½ lbs. mixed cakes	.09		1.67
36 lbs. cheese	.17		6.12
1 bbl. 43 lbs. soda crackers	.07		3.01
30 lbs. raisins	.07		2.10
4 bus. carrots	.90		3.60
2 bus. onions	.90		1.80
247 1 crate cabbage	....		1.80
1 crate 8 doz. cucumbers	.20		1.60
1 bbl. apples	....		2.75
10 bus. potatoes	.90		9.00
10 case (20) 4 lb. pkgs. Jumbo powder	....		2.60
3 balls twine	.05		.15
10 ½ bbls. flour	6.40		32.00
400 lbs. gran. sugar	5.50		22.00

150 lbs. lard	.12	18.00
314 lbs. hams	.18	56.52
52 lbs. bacon	.20	10.40
28 lbs. salt pork	.18	5.04
1 chest 65 lbs. tea	.20	13.00
50 lbs. coffee	.13½	6.75
240 lbs. butter	.22	52.80
8 doz. cans peas	.85	6.80
8 doz. cans corn	.80	6.40
2 doz. gal. can apples	2.90	5.80
2 doz. gal. can pie plant	2.40	4.80
100 lbs. com. salt	.00½	.50
1 lb. nutmegs	....	.20
1 doz. 2 lb. cans b. powder	....	2.40
		$290.88

O. K. C. S. Brown.
—— Brogan (red ink).

Stamp:
Charge to —— ——.
Prices correct —— ——.
Extension correct —— ——.
Material received L. T. Brogan.

BROGAN EXHIBIT 10.

Phones, Bell West 228. Cuy. Cent. 5458.

CLEVELAND, OHIO, Aug. 8, 1910.

M. Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Order No.7423.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th Street 2461-2465 Detroit Avenue.

Soo (blue pencil). J. 174.

248	1½ doz. sheets	6.00	9.00
	1½ doz. pillow slips	1.50	2.25
2 doz.	roller towels	2.50	5.00
			$16.25

O. K. C. S. Brown.

Stamp:
Charge to —— ——.
Prices correct —— ——.
Extension correct —— ——.
Material received —— ——.

BROGAN EXHIBIT 11.

CLEVELAND, O., Aug. 12, 1910.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.
Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

150 lbs. butter		.22	33.00
5 gals. sour pickles		....	1.25
6 doz. cans peas		.85	5.10
6 doz. cans tomatoes		.75	4.50
6 doz. cans plums		1.35	8.10
6 doz. cans corn		.80	4.80
6 ½ pint bots. vanilla ext		....	.80
6 ½ pint bots. lemon ext		....	.67
1 box 36 lbs. raisins		.06¼	2.25
5 lbs. cocoanut		....	.63
1 box 27½ Waverly cakes		.09	.48
1 box 29 lbs. grah. crackers		.08	2.32
50 lbs. coffee		.13½	6.75
50 lbs. tea		.20	10.00
2 doz. gal. cans pie plant		2.40	4.80
1 box 50 lbs. macaroni		.04	2.00
50 lbs. oatmeal		....	1.44
268 lbs. hams		.17½	46.90
58 lbs. bacon		.19½	11.31
100 lbs. lard		.12	12.00
2 doz. roller towels		2.50	5.00
3 doz. blankets		7.20	21.60
4 doz. tea spoons		....	.60
	2 doz. layer cake tins	....	1.10
249	8 doz. cucumbers	....	2.40
	1 crate cabbage	....	1.80
1 bus. beets		....	1.10
1 bus. turnips		....	.75
1 bus. carrots		....	1.10
			$196.55

J. 168 (blue pencil).
O. K. C. S. Brown.
Soo (blue pencil).

Stamp:
Charge to —— ——.
Prices correct —— ——.
Extension correct —— ——.
Material received, L. T. Brogan.

BROGAN EXHIBIT 12.

CLEVELAND, O., Aug. 27, 1910.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.
Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

8 ½ bbls. flour		c6.40	25.60
300 lbs. gran. sugar		5.60	16.80
210 lbs. butter		.22	46.20
50 lbs. coffee		.13½	6.75
150 lbs. lards		.12	18.00
1 box 32½ lbs. Waverly cookies		.09	2.93
1 box 28 lbs. graham crackers		.08	2.24
4 28 lb. sacks salt		.18	.72
1 doz. bottles mustard		....	.90
1 doz. gal. cans rhubarb		....	2.40
1 doz. gal. cans apples		....	2.90
1 doz. gal. cans black berries		....	4.90
4 doz. cans salmon		1.35	5.40
2 cases hotel milk		4.00	8.00
50 lbs. rolled oats		....	1.44
1 box (200 cakes) white soap		....	4.25
2 boxes com. mot. soap		2.25	4.50
1 6-qt. stew kettles with cover		....	.38
200 No. 1 heavy paper bags		.13	.26
1 doz. salt shakers		....	.48
250 1 doz. pepper shakers		....	.48
3 doz. cotton blankets		7.20	21.60
3 doz. comforters		10.50	31.50
3 doz. white sheets		6.00	18.00
3 doz. pillow slips		1.50	4.50
3 doz. roller towels		2.50	7.50
5 gals. mix. pickles		.50	2.50
25 lbs. pulv. sugar		.06	1.50
3 doz. celery		.40	1.20
1 crate cabbage		....	2.40
1 crate (8 doz.) cucumbers		.20	1.60
2 bus. white turnips		.75	1.50
2 bus. carrots		1.10	2.20
1 bbl. green apples, Duchess		....	3.75
1 doz. bracket lamps, complete		....	5.25
			$260.53

O. K. C. S. Brown.

Soo (blue pencil).

Stamp:

Charge to —— ——.
Prices correct —— ——.
Extension correct —— ——.
Material received—L. T. Brogan.

BROGAN EXHIBIT 13.

Phones: Bell, West 228. Cuy. Cent. 5458.

CLEVELAND, OHIO, July 1, (Year torn off sheet).

M. The Standard Contracting Co.,

Sailors' Encampment, Neebish, Mich.

Order No. 8862.

162. Bought of J. P. Brogan, Grocer, 1368-1388 West 25th Street, 2461-2465 Detroit Avenue.

150 lbs. lard	12¼	18.38

O. K. L. T. Brogan.
O. K. C. S. Brown.

Stamp:

Charge to —— —— Soo (lead pencil).
Prices correct —— ——.
Extension correct —— ——.
Material received —— ——.

251 BROGAN EXHIBIT 14.

Sheet 1, F. H. F.

CLEVELAND, O., Sept. 29, 1910.

The Standard Contracting Co.,

Sailor's Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

10 ½ bbls. flour	6.20	31.00
300 lbs. butter	.22	66.00
150 lbs. lard	.12¼	18.38
305 lbs. hams	.18	54.90
108 lbs. bacon	.20	21.60
62 lbs. salt pork	.17	10.54
2 kegs pigs feet	2.25	4.50
½ bbl. sauer kraut	5.00	2.50
15 gals. vinegar	.12½	1.88
2 gals. catsup	.40	.80
50 lbs. coffee	.13½	6.75
1 chest 65 lbs. tea	.20	13.00
12 10-lb. sacks salt	.07	.84

10 gals. mix. pickles		.65	6.50
5 gals. sour pickles		.25	1.25
2 boxes 60 lbs. Waverly cakes		.09	5.40
1 box 26 lbs. lemon cakes		.08	2.08
1 box 20 lbs. mixed cookies		.09	1.80
10 bus. potatoes		.85	8.50
2 bus. beets		.75	1.50
2 bus. carrots		.75	1.50
1 crate cabbage		....	1.50
8 doz. cucumbers		.22	1.76
1 bbl. apples		....	2.75
2 bus. onions		.75	1.50
4 doz. gal. can apples		2.90	11.60
4 doz. cans peas		.85	3.40
4 doz. cans plums		1.35	5.40
4 doz. cans apricots		1.55	6.20
4 doz. cans blk. berries		1.30	5.20
1 case cond. milk		....	4.00
10 yards white oil cloth		.22	2.20
1 doz. deck brooms		....	4.50
1 doz. water glasses		....	.50
	2 doz. white slips	1.50	3.00
252	2 doz. celery	.35	.70
	2 bus. tomatoes	.90	1.80
	(Amount forward)		$317.23

Center of page in blue pencil is "186."

Sheet 2, F. H. F.

Stamp:
Charge to Soo Cont. (red ink).
Prices correct —— ——.
Extension correct —— ——.
Material received, L. T. Brogan.

(Same heading as sheet I for this sheet.)

Amount forward			$317.23
2 doz. No. 2 chimneys		.54	1.08
1 case Jumbo powder		....	2.60
1 case (200 cakes) white soap		....	4.25
1 case com. soap		....	2.25
1 crate 2 doz. summer squash		.50	1.00
1 box 30 lbs. grah. crackers		.08	2.40
			$330.81

Stamp:
Charge to Soo Contract (red ink).
Prices correct —— ——.
Extension correct —— ——.
Material received, L. T. Brogan.

BROGAN EXHIBIT 15.

CLEVELAND, O., July 21, 1910.

Orders Promptly Attended to.

S. The Standard Contracting Co.,
Sailor's Encampment, Neebish, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies,
1386-1388 West 25th Street.

Vessel Trade a Specialty.

Phones: Bell, West 228. Cuyahoga, Central 5458.

Superlative Flour Makes the Best Bread.

284 lbs.	hams	.19	53.96
58 lbs.	salt pork	.17	9.86
253 55 lbs.	bacon	.20	11.00
4½ bbls.	flour	6.40	12.80
150 lbs.	lard	.12¼	18.38
4 crates 120 doz.	eggs	.22	26.40
200 lbs.	gran. sugar	5.50	11.00
50 lbs.	tea	.20	10.00
10 lbs.	blk. pepper	.11½	1.15
1 doz.	cans Inv. V. B. Powder	....	2.40
200	10-lb. bags	.16	.32
1 roll	24 10-16 lb. paper	.03	.74
2 doz.	pkgs. tooth picks	.30	.60
10 lbs.	cocoanut	.12½	1.25
2 lbs.	ginger	.12	.24
1 lb.	cloves	....	.18
4 doz.	cans tomatoes	.75	3.00
2 doz.	cans peaches	1.35	2.70
2 doz.	cans peas	.75	1.50
4 doz.	cans string beans	.60	2.40
2 doz.	cans pears	1.00	2.00
1 box	25 lbs. lemon cakes	.08	2.00
1 box	29 lbs. grah. crackers	.08	2.32
1 box	28½ lbs. Waverly cookies	.09	2.57
20 gals.	vinegar	.12½	2.50
1 crate	40 heads cabbage	.04	1.60
2 bus.	onions	1.40	2.80
1 crate	3 doz. cucumbers	.55	1.65
2 large	granite dippers	.18	.36
12 doz.	green onions	.10	1.20
			$188.88

O. K. L. T. Brogan.
O. K. C. S. Brown.

Stamp:
Charge to Soo Con. (red ink).
Prices correct —— ——.
Extension correct —— ——.
Material received —— ——.
Jr. 156 (blue pencil).

254 BROGAN EXHIBIT 16.

CLEVELAND, O., July 11, 1910.

Orders Promptly Attended to.

S. The Standard Contracting Co.,

Sailor's Encampment, Neebish, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies,
1386-1388 West 25th Street.

Vessel Trade a Specialty.

Phones: Bell, West 288. Cuyahoga, Central 5458.

Superlative Flour Makes the Best Bread.

295 lbs. hams	.19	56.05
400 lbs. gran. sugar	5.50	22.00
1 box 20 lbs. grah. crackers	.08	1.60
1 box 21 lbs. lemon crackers	.08	1.68
1 box 26 lbs. oatmeal crackers	.08	2.08
1 box 41 lbs. ginger snaps	.07	2.87
8½ bbls. flour	6.20	24.80
10 gals. mix. pickles	.50	5.00
4 crates 120 doz. eggs	.22	26.40
2 gals. catsup	.40	.80
4 doz. cans tomatoes	.75	3.00
4 doz. cans peas	.75	3.00
4 doz. cans corn	.80	3.20
4 doz. cans string beans	.60	2.40
4 doz. cans peaches	1.35	5.40
4 doz. cans pears	1.00	4.00
4 doz. cans apricots	1.55	6.20
2 doz. gal. cans apples	2.75	5.50
1 crate cabbage, 30 heads	.05	1.50
50 lbs. dried peaches	.09	4.50
1 crate 4 doz. cucumbers	.50	2.00
1 case lemons	....	7.75
6 ice water pitchers	6.75	3.38
2 doz. pie plates	.54	1.08
2 doz. 10-in. veg. dishes	3.25	6.50
1 doz. 11-inch meat platters	....	2.15
2 doz. water glasses	.45	.90
150 lbs. lard	.12¼	18.38
2 doz. white sheets	6.00	12.00
1 doz. cotton blankets	....	7.20
		$243.32

O. K. L. T. Brogan.

255 O. K. C. S. Brown.

Jr. 156 (blue pencil).

Stamp:

Charge to Soo Contract (red ink).
Price correct ——.
Extension correct ——.
Material received ——.

BROGAN EXHIBIT 17.

CLEVELAND, O., June 20, 1910.

Phones: Bell, West 228. Cuy. Cent. 5458.

M. The Standard Contracting Co.

Order No. 8847.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th Street. 2461-2465 Detroit Avenue.

Stamp:
Charge to Soo Con. (red ink).
Prices correct ——.
Extension correct. O. P. S.
Material received ——.
J. R. 156 (Blue pencil).

5 yards cheese cloth	.05	.25
2 doz. water glasses	.45	.90
		$1.15

BROGAN EXHIBIT 18.

O. K. L. T. Brogan.
O. K. C. S. Brown (lead pencil).

Delivered to Geo. Worthington Co.

Phones: Bell, West 228. Cuy. Cent. 5458.

CLEVELAND, OHIO, May 9, 1911.

M. The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th Street. 2461-2465 Detroit Avenue. J. 29 (blue pencil).

Amount forward		$429.92
2 doz. blankets, Warsaw	8.25	16.50
2 doz. Excelsior pillows	2.40	4.80
		$451.22

O. K. L. T. Brogan.

256 CLEVELAND, O., May 9, ——.
(Fastener through year.)

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

Written on side of this page: Brogan Ex. 18. Sheet 2, F. H. F.

Amount forward		$340.80
1 pail 20 lbs. cocoanut	.14	2.80
2 cases 8 doz. cans salmon	1.70	13.60
1 case 40 lbs. corn starch	.04½	1.80
5 lbs pepper	.11½	.58
2 doz. water glasses	.50	1.00
3 doz. sauce dishes	.36	1.08
1 doz. tea cups and saucers	....	.95
6 ½ pint bots. vanilla ext	1.60	.80
6 ½ pint bots. lemon ext	1.35	.67
1 doz. jars mustard	....	.90
2 doz. dinner plates	.85	1.70
1 flour sifter	....	.10
2 bus. turnips	.60	1.20
1 case lye	....	1.75
1 large tea kettle	....	.80
1 3-gal. tea pot	....	.90
1 3-gal. coffee pot	....	.90
1 roll 29 lbs. wrapping paper	.03½	1.02
1 doz. 14-qt. galv. pails	....	2.10
160 lbs. salt pork	.13	13.78
200 asst. bags (5 and 10 lb.)	.12	.24
6 balls twine	.05	.30
6 pkgs. tacks	.04	.24
1 bask. 3 doz. cucumbers	.65	1.95
6 1-qt. milk pitchers	.19	1.14
12 yds. white table oil cloth	.20	2.40
50 lbs. powd. sugar	4.75	2.37
1 piece floor oil cloth 11½ x 15 ft. 1 piece floor oil cloth 5½ x 5 ft. 1 piece floor oil cloth 8½ x 10 ft. 1 piece floor oil cloth 8½ x 9½ ft. 45 yards at 28c	....	12.60
2 can openers	.05	.10
1 roll mosquito netting	....	.60
257 1 meat saw	....	.90
1 steel	....	.85
2 doz. quilts	8.50	17.00
Amount forward		$429.92

On this side of sheet: Sheet 3, F. H. F.

CLEVELAND, O., May 9, ——.
(Fastener in year.)

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

1 box 25 lbs. prunes		.11	2.75
1 box 50 lbs. raisins		.07½	3.75
100 lbs. butter		.22	22.00
50 lbs. lard		.09	4.50
67 lbs. cheese		.14	9.38
2 boxes 42 lbs. soda crackers		.07	2.94
2 bbls. 696 lbs. gran. sugar		5.30	36.89
100 lbs. com. salt		.0½	.50
½ bbl. pickles		....	4.75
12 doz. cans tomatoes		.92½	11.10
12 doz. cans peas		.95	11.40
12 doz. cans corn		.80	9.60
12 doz. cans string beans		.65	7.80
12 doz. cans apricots		1.55	18.60
12 doz. cans pears		.90	11.40
12 doz. cans peaches		1.35	16.20
12 doz. cans blk berries		1.25	15.00
4 boxes 69 lbs. asst. cookies		.09	6.21
5 gals. catsup		.40	2.00
1 crate new cabbage		....	2.25
3 cases 90 doz. eggs		.18	16.20
1 box 12 lbs. plain chocolate		.28	3.36
3 crates onions		2.15	6.45
1 keg 14 gals. molasses		.23	3.22
2 cases cond. milk Peerless		3.50	7.00
50 lbs. coffee		.17	8.50
3 cases common soap		2.25	6.75
2 cases sailor soap		4.00	8.00
	1 doz. pkgs. Gold Dust	....	2.08
258	1 doz. cabin brooms	....	3.25
	15 bus. potatoes	.68	10.20
106 lbs. hams		.14	14.84
73 lbs. bacon		.16	11.68
6 bbls flour		5.60	33.60
1 case 2 doz. Im. Bkg. Powder		2.25	4.50
1 box Yeast Foam		....	1.15
25 lbs. rice		.04	1.00
(Amount forward)			$340.80

BROGAN EXHIBIT 19.

Sheet 1, F. H. F.

Orders Promptly Attended to.

CLEVELAND, O., June 23, 1911.

The Standard Contracting Co.
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Wholesale and Retail Dealer in Staple and Fancy Groceries and General Ship Supplies, 1386-1388 West 25th Street.

Vessel Trade a Specialty.

Phones: Bell, West 228; Cuyahoga, Central 5458.

Superlative Flour Makes the Best Bread.

Amount forward		$421.37
1 case 40 lbs. corn starch	.04	1.60
5 lbs. pepper	.12	.60
1 case (4 doz. cans) lye	....	1.75
100 lbs. salt pork	.14	14.00
1 hamper cucumbers	....	2.70
2 doz. radishes	.18	.36
6 large bchs. green onions	.09	.54
4 doz. bchs, beets	.25	1.00
2 bushels lettuce	.40	.80
4 doz. bchs, pie plant	.30	1.20
4 doz. bchs, turnips	.30	1.20
		$447.12

O. K.
L. T. BROGAN, *Supt.*

259

Sheet 2, F. H. F.

CLEVELAND, O., June 23, 1911.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th St.

1 box 25 lbs prunes	.11	2.75
1 box 50 lbs. raisins	.08½	4.25
100 lbs. butter	.22	22.00
1 50-lb. tin lard	.08¾	4.38

2 cheese-, 66½ lbs.	.13½	8.98
2 boxes, 40 lbs. soda crackers	.07	2.80
2 bbls. 709 lbs. gran. sugar	5.40	38.29
100 lbs. sale	....	.50
1 keg pickles	....	3.75
12 doz. cans tomatoes	.92½	11.10
12 doz. cans peas	.95	11.40
12 doz. cans corn	.80	9.60
12 doz. cans string beans	.65	7.80
12 doz. cans pears	.95	11.40
12 doz. cans peaches	1.35	16.20
4 boxes 99 lbs. asst. cookies	.09	8.91
5 gals. catsup	.40	2.00
1 crate cabbage	....	2.90
3 crates 90 doz. eggs	.18	16.20
1 box 12 lbs. plain chocolate	....	3.36
1 bag, 107 lbs onions	....	3.75
1 10-gal. keg molasses	....	2.30
2 cases cond. milk	3.50	7.00
50 lbs. coffee	.17	8.50
3 boxes com. mot. soap	2.25	6.75
2 boxes Fairy soap	4.00	8.00
2 cases Gold Dust, Swift's	3.75	7.50
2 doz. cabin brooms	2.75	5.50
15 bus. old potatoes	1.20	18.00
2 bbls. 509 lbs. hams	.15½	78.90
201 lbs bacon	.15	30.15
6 bbls. flour	5.60	33.60
1 case 2 doz. (2-lb. cans) B. Powder	2.25	4.50
1 box 3 doz. Yeast Foam	....	1.15
25 lbs. rice	.04	1.00
1 box 20 lbs. cocoanut	.13	2.60
2 cases 8 doz. cans salmon	1.70	13.60
(Amount forward)		$421.37

260 BROGAN EXHIBIT 20.

CLEVELAND, O., June 7, 1911.

The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th Street.

J. 39 (blue pencil).

50 lbs. rice	.04	2.00
1 case matches	....	.90
12 cans No. 10 table syrup	....	3.90
1 case Gold Dust	....	4.15
1 doz. mops complete	....	2.25
2 doz. cans apricots	1.55	3.10

2 doz. pkgs. graham crackers	1.00	2.00
100 lbs. butter	.22	22.00
212 lbs. hams	.15	31.80
3 crates 90 doz. eggs	.17½	15.75
3 doz. gal. cans apples	3.50	10.50
2 chests 134 lbs. green tea	.20	26.80
1 bbl. rolled oats	....	4.15
1 box 50 lbs. raisins	.08½	4.25
6 boxes tooth picks	.30	.15
2 bbls. flour	5.60	11.20
200 lbs. lard	.08¾	17.50
1 flour sieve, Royal XXX	....	.20
1 case maple corn flakes	....	2.85
1 collander	....	.27
4 doz. cans salmon	1.70	6.80
2 double mattresses	2.25	4.50
6 single mattresses	.95	5.70
		$182.72

O. K. L. T. Brogan.

261–285 BROGAN EXHIBIT 21.

CLEVELAND, OHIO, June 7, 1911.

M. The Standard Contracting Co.,
Sailors' Encampment, Neebish, Mich.

Order No. 7644.

Bought of J. P. Brogan, Grocer, 1386-1388 West 25th Street; 2461-2465 Detroit Avenue.

15 yards white cotton cloth	.09	1.35
15 yards red cotton cloth	.10	1.50
10 yards black cotton cloth	.06	.60
20 yards mosquito netting	.07	1.40
		$4.85

O. K. L. T. Brogan.

* * * * * * *

286 U. S. EXHIBIT 1.

F. R. W. Ste.

United States of America,
War Department.

WASHINGTON, March 12, 1913.

I Hereby Certify that the attached papers, consisting of fourteen sheets, constitutes true copies of a contract and a bond on file in the office of the Chief of Engineers U. S. Army.

W. H. BIXBY,
Chief of Engineers, U. S. Army.

I Hereby Certify that W. H. Bixby, who signed the foregoing certificate, is the Chief of Engineers, U. S. Army, and that to his certificate as such full faith and credit are and ought to be given.

In testimony whereof, I, Lindley M. Garrison, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief
287 Clerk of the said Department, at the City of Washington, this 13th day of March, 1913.

LINDLEY M. GARRISON,
Secretary of War,
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

[Seal U. S. War Office.]

War Department
Standard Form No. 14.

Improving Hay Lake and Neebish Channels, St. Marys River, Michigan.

War Department.

Advertisement.

U. S. Engineer Office,
Jones Building.

DETROIT, Mich., June 18, 1908.

Sealed proposals for dredging Hay Lake and Neebish Channels, Saint Marys River, Michigan, will be received at this office until 3 p. m., July 21, 1908. Information on application.

C. McD. TOWNSEND,
Lieutenant-Colonel, Engineers.

General Specifications.

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. Each guarantor will justify in the sum of at least one-tenth of the bid concerned. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of not less than ten (10) per cent, of the estimated amount of the contract within ten (10) days after being notified of the acceptance of his proposal. The
288–295 contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and

will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

* * * * * * *

296 44. Accommodations.—The contractor shall furnish regularly to inspectors, on the dredge where practicable, a suitable room for office and sleeping purposes, and shall furnish to the inspectors, and when required, to other United States agents visiting the work or assisting in its supervision, suitable board satisfactory to the Engineer, and equal to any furnished any of the contractors' agents, such accommodations to be paid for by the United States at special rates, as follows: $0.60 per day or $0.20 per occasional meal per person. Accommodations on shore shall include transportation to and from work.

* * * * * * *

297 1. This Agreement entered into this twelfth day of August, nineteen hundred and eight, between C. McD. Townsend, Lt.-Col., Corps of Engineers, United States Army, of the first part, and Standard Contract Company of Cleveland, in the County of Cuyahoga, State of Ohio, of the second part, Witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said C. McD. Townsend, Lt. Col., Corps of Engineers for and in behalf of the United States of America, and the said Standard Contracting Company, do covenant and agree, to and with each other, as follows:

That the said parties of the second part shall furnish all the necessary plant, material and labor and shall do all the work indicated in the aforesaid specifications as required for dredging at Section 4, Item R, Hay Lake and Neebish Channels, St. Marys River, Michigan, and for all materials excavated and deposited as required by the said specifications shall receive payment from the party of the first part as follows:

For excavation to the depth of 22 ft. below the established datum as specified in paragraph 29 of the said specifications at full rate of $2.95 per cubic yard, bank measurement, and

For excavation between the depths of 22 and 23 ft. below the same datum at one-half the rate specified above.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as

298 do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said parties of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 33, 35 and 36 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the

first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the parties of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the parties of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the parties of the second part; and the party of the first part may deduct all the above mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the parties of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first
299 part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the parties of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the parties of the second part; Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the parties of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such

change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

300 7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payment shall be made to the said parties of the second part as prescribed in paragraph 16 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transfer-er or the transferee, but all rights of action for any breach of this contract by said Standard Contracting Co., are reserved to the United States.

13. No Member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United

301 States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the first date hereinbefore written.

Witnesses:

B. G. A. LAITNER, as to—

C. McD. TOWNSEND,
Lt. Col., Corps of Engineers, U. S. A.

THOMAS ROBINSON, *Sec'y*, as to—

THE STANDARD CONTRACTING CO.
As to W. C. JONES, *Pres.*

[CORPORATE SEAL.]

(Executed in triplicate.)

Approved: September 11, 1908.

FREDERIC V. ABBOTT,
Acting Chief of Engineers.

Transcript from Minutes of Directors' Meeting of the Standard Contracting Company, Held at the Office of the Company, Cleveland, Ohio, October 25th 1904.

On motion, it was unanimously resolved that full power and authority be, and the same is hereby given to Mr. W. C. Jones, President of this Corporation to sign its corporate name to any notes, papers, documents, bids, contracts, receipts, vouchers or warrants and to endorse the same, and to sign this Company's corporate name to any and all papers requisite and necessary in the transaction of the company's business, and that said W. C. Jones as president is hereby given full power and authority to receipt for all moneys due and payable to this Company from any source whatsoever.

I hereby certify that the foregoing is a true and correct copy of the resolution adopted at the above mentioned meeting, and of the minutes thereof.

[CORPORATE SEAL.] THOMAS ROBINSON, *Scy.*

Attest.

302 *Transcript from Minutes of Directors' Meeting of the Standard Contracting Company, Held at the Office of the Company, Cleveland, O., January 15th,* 1907.

On motion, Mr. W. C. Jones was nominated to the office of President and Treasurer of the above company, and as a result of the ballots cast, the chairman declared that W. C. Jones was duly elected to fill the office of president and treasurer of the Standard Contracting Company during the ensuing year and until his successor is elected and qualified.

I hereby certify that the foregoing is a true and correct copy of the resolution adopted at the above mentioned meeting, and of the minutes thereof.

[CORPORATE SEAL.] THOMAS ROBINSON, *Scy.*

Attest.

Contractor's Bond (Public Works).

(When Both Principal and Surety are Corporations.)

Know all men by these presents, That we, The *The* Standard Contracting Company of Cleveland, O., a corporation existing under the laws of the State of Ohio as principal, and National Surety Company, a corporation existing under the laws of the State of New York, as surety, are held and bound unto the United States of America in the penal sum of $25,000, to the payment of which sum well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above bounden The Standard Contracting Company has, on the 12th day of August, 1908, entered into a contract with the United States, represented by Lieut. Col. C. McD. Townsend, Corps of Engineers, U. S. A., for dredging Hay Lake and Neebish Channels, St. Marys River, Michigan.

Now therefore, if the above bounden, The Standard Contracting Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements, in and by the said contract agreed and covenanted by said The Standard Contracting Company, to be observed and
303–327 performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 12th day of August, 1908, the name and corporate seal of said principal being hereto affixed and these presents duly signed by its president, pursuant to a resolution of its board of directors passed on the 15th day of January, 1907, a copy of the record of which is hereto attached; and the name and corporate seal of said surety being hereto affixed and these presents duly signed by its Res. Vice-President pursuant to resolution of its board of directors passed on the 6th day of February, 1900, a copy of the record of which is on file in the War Department.

THE STANDARD CONTRACTING CO.,
By W. C. JONES, *Prest.*

Attest:
THOMAS ROBINSON, *Scy.*

NATIONAL SURETY COMPANY,
By JOSEPH W. COOK, *Res. Vice-Pres.*

Attest:
A. F. MONROE, *Res. Ass't. Sec'y.*

[CORPORATE SEAL OF CONTRACTOR.]
[CORPORATE SEAL OF SURETY.]

* * * * * * *

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Appearance of Counsel.

(Filed June 6, 1914.)

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the plaintiff in error.

TOLLES, HOGSETT, GINN & MORLEY.

Appearance of Counsel.

(Filed Aug. 11, 1914.)

The appearance of Frederick C. Slee, as Attorney for The Pluto Powder Company is hereby entered.

FRED'K C. SLEE,
Attorney for The Pluto Powder Company.

Dated, Buffalo, N. Y., August 10th, 1914.

Entry—Cause Argued.

(Nov. 4, 1915—Before Knappen and Denison, C. J., and McCall, D. J.)

This cause is argued by Mr. John M. Garfield for the plaintiff in error and by Mr. John A. Cline for the defendants in error and is continued until tomorrow for further argument.

Entry—Cause Argued and Submitted.

(Nov. 5, 1914—Before Knappen and Denison, C. J., and McCall, D. J.)

This cause is further argued by Mr. E. S. B. Sutton and Mr. Ben H. Davis for the defendants in error and by Mr. John M. Garfield for the plaintiff in error and is submitted to the court.

Opinion.

(Filed Jan. 14, 1916.)

Filed Jan 14, 1916. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2651.

NATIONAL SURETY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES for the Use of Sundry Claimants, Defendant in Error.

Error to the District Court of the United States for the Western District of Michigan, Southern Division.

Submitted November 7, 1915. Decided January 14, 1916.

Before Knappen and Denison, Circuit Judges, and McCall, District Judge.

The Standard Contracting Company received an award from the United States for deepening the channel in a portion of St. Mary's River, and entered into a contract to do the work pursuant to the award. It gave to the United States the bond required by the Act of August 13, 1894, as amended February 24, 1905, with the National Surety Company, as surety, and in the sum of $25,000. Before completing the work, the contractor failed, and the job was finished by its receiver. In the court below, sitting as a court of law, suit was commenced by summons by the Pittsburgh & Buffalo Company, as plaintiff, but in the name of the United States, against the contractor and the surety, as defendants. The suit was based upon the bond, and was to recover an unpaid balance of $4,200 owing for coal furnished by the Pittsburgh & Buffalo Company to the contractor company for its necessary use in the dredging and other work required by the contract. Subsequently, there were ten intervening claims: by Hanna & Company for coal, $4,200; by the Pluto Powder Company for dynamite and electric exploders, $6,180; by the Pattison Supply Company for iron, machinery, hardware and general supplies, $3,500; by George Kemp for coal, $3,000; by the Soo Hardware Company for supplies for dredges, tugs and drill boat, which supplies consisted of oil, paint, nails, rope, valves, round iron, etc., $500; by the George Worthington Company for hardware and supplies, $1,900, which hardware and supplies consisted of nuts, bolts, valves, packing, files, iron pipe, square iron, etc.; by the Upson-Walton Company for cordage, tackle, ship supplies and ship chandlery articles, $900; by the Cleveland Steel Casting Company for miscellaneous castings as ordered, $200; by J. P. Brogan for groceries

and supplies for the company boarding house, $4,600; by David Helman for oak timbers, $600. The surety appeared and pleaded to the merits to the original claim and separately upon each intervention. The summons was served by publication against the contractor, but the record does not show either its appearance or its default for not appearing. Such omission in the record is not relied upon by any party, and so will not be further noticed.

A jury was waived, and the court made findings of fact to the effect that there were unpaid claims as above recited, and findings of law to the effect that supplies consumed or used up by the contractor in the progress of the work were within the security contemplated by the bond, but that materials which became a part of the permanent equipment of the contractor and survived the completion of the work were not secured. Under this classification, the claims of plaintiff and eight intervenors were allowed, in amounts aggregating about $28,000; and since the penalty of the bond was only ninety per cent. of the liability, each claimant was given a judgment for ninety per cent. of his allowed claim. This judgment took the form of a single entry, giving the name of each successful claimant, and reciting the ninety per cent. allowed to him, forming a total of $25,000, and adjudging that the United States, for the use and benefit of the claimants whose claims had been allowed, recover from the Surety Company $25,000 for its damages, and also recover the costs of each intervenor. To review this judgment, the Surety Company brought this writ of error, alleging as errors that a court of law had no jurisdiction because the statutory proceeding could be only in equity, and that the conclusion of law as to the liability to each successful claimant was erroneous. The sufficiency of the assignments will be further mentioned.

DENISON, *Circuit Judge:*

We pass by, without deciding, certain considerations affecting the right of the Surety Company to insist that a court of equity had exclusive jurisdiction, and assume that it had—and has—the full right to be heard on that question. Its contention is fully supported by the opinion of the Circuit Court of Appeals of the Second Circuit in Illinois Surety Co. v. United States, 212 Fed. 136, filed since the hearing of this case below. The contrary result has been reached in the Seventh Circuit (Illinois Surety Co. v. United States, 226 Fed. 653, 664). In the present case, the bond is not sufficient to pay all the claims, and if, upon a writ of error attacking only certain claims, they are set aside, whereby the fund becomes sufficient to pay all, the other claimants who have not assigned error can get no benefit, according to the common law rule affecting several judgments. In such a case, the defendant surety might go free of part of its liability; and so there is direct force in the argument that a court of equity is the appropriate tribunal, and that, therefore, it will be presumed that Congress intended to put the jurisdiction there; yet, even since the amendment of the statute, so many courts—and the Supreme Court so many times[1]—have assumed that there was

[1]Mankin v. Ludovici Co., 215 U. S. 533; United States v. Construction Co., 222 U. S. 199; Texas Co. v. McCord, 233 U. S. 157.

jurisdiction in the law court that we are reluctant to consider all these decisions inadvertent. It is enough to turn the scale when we observe, as was done in the Seventh Circuit, that, by the enactment of June, 1915, Sec. 274*a* of the Judicial Code—and which enactment applies to pending cases—the only effect of holding in this case that the true jurisdiction was in equity, would be to send the case back to be transferred to the equity side and heard over again by the same judge upon probably the same proofs. Upon the whole, we are better satisfied to say that the court below had jurisdiction.

The statute involved has been many times considered, but the Supreme Court has never had occasion to declare broadly the meaning of "labor and materials." The standard lien statutes, with reference to buildings, in force, probably, in every State, contemplate materials and labor which directly enter into the structure itself. We are not aware of any decisions extending these State statutes so as to reach and create liens for labor or materials which contribute to the construction so indirectly as do the supplies consumed by the contractor in operating his plant. Of course, where the statute, by its words or by judicial interpretation, gives a lien for labor or materials furnished to subcontractors, it carries us one step away from the structure itself; but this does not necessarily mean more than that the rule of direct contribution is to be applied to the work of the subcontractors.

The language of the present federal statute does not seem to be materially different from the typical State lien statute. There is a distinction between the original and the amended act. The Act of 1894 directed that the bond given to the United States to secure the completion of the contract should have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work;" and further specified that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work." When the statute was amended in 1905, there was no change in the language fixing the condition of the bond, but it was specified that recovery thereon could be had by the person who had "furnished labor or materials used in the construction or repair" of the work. The substitution of this language, which adopted the usual phraseology of the lien statutes, in the place of the former more general reference to "materials for the prosecution of the work" is not to be overlooked, and at least has a tendency to bring this statute into harmony with the lien statutes of the States. Some of the decisions, even since the amendment to the statute, speak as if it contained only the provisions fixing the form of the bond and reached all persons "supplying the contractor with labor and materials in the prosecution of the work," regardless of whether these things were "used in the construction;" but it is obvious that the two clauses must be read together, and that the provision which gives a right to an intervenor only in case he has furnished labor and materials "used in the construction or repair," must receive its due force in interpreting the statute as a whole.

The Supreme Court has repeatedly declared that the bond provided for by this statute is a substitute for the lien of the mechanics' lien laws (Guaranty Co. v. Pressed Brick Co., 191 U. S., 416, 425; Hill v. Surety Co., 200 U. S., 197, 203; United States v. Ansonia Co., 218 U. S., 452, 471; Title Co. v. Crane Co., 219 U. S., 24, 32; Equitable Co. v. United States, 234 U. S., 448, 455); and this declaration of purpose at least suggests that the scope as well as the purpose may be discerned from comparison with the State statutes. The Supreme Court in the Pressed Brick Company case, extended the protection of the statute to subcontractors, in the Hill case, to materials furnished to a subcontractor, and in the Equitable Company case, to a contract which had been somewhat changed after the surety's undertaking was made. In each of these cases, there is a statement or intimation that the statute is to be construed liberally to accomplish its purpose, rather than strictly, but in each case the labor or material involved was of the class which entered directly into the work, and no one of these cases decides whether or not this liberality of construction will avail to reach classes of materials not commonly thought within State statutes.[2] The subject of what specific materials are included, we find touched upon by that court in only two cases: Title Co. v. Crane, supra, and United States v. Bartlett, 231 U. S., 237. In the former case, certain claims for cartage and towage are approved as leading to liability under the bond (p. 34). The contract related to building a boat; the towage and cartage claims were, apparently, for hauling some materials. They could not have been for labor, and so they must have been for materials. If we seek to apply the word "furnished" found in the statute, it would seem that the materials delivered at the work, through hauling or towing done by a carrier, were furnished jointly by the vendor and the carrier, and that the value of the transportation entered into and became a part of the value of the delivered material.[3] The case is, therefore, not necessarily inconsistent with the idea that the "materials" contemplated by the statute are those commonly so considered under the lien statutes. The case also allows a claim for patterns furnished to his molding department for the contractor who was building the marine engine which was a part of the boat. This pattern claim

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[2] The present force of Judge Putnam's comment in American Co. v. Lawrenceville Co., 110 Fed. 717, 719, to the effect that this statute should not be limited, like the lien statutes, to materials added to the value of the structure, may be somewhat lessened because it had reference to the original act and because it was written before the Supreme Court had so often declared that the bond was a substitute for the liens.

[3] "Ordinarily, the contractor for materials delivers the same and includes the expense of the hauling in the price of the materials. No objection, so far as we are aware, has ever been made to thus including the expense of the hauling and the price of the material. If it may be so included and lien made to cover the same, why may not the cartman make a separate contract for hauling and acquire a valid lien therefor?" Kehoe v. Hansen, 8 So. Dak. 198, 200.

seems to be for labor rather than for materials. The engine builder, normally, makes patterns, makes molds, pours the castings and machines them. All these things are done by the labor of his employes. If he gets some one else to make the patterns for him, their price is none the less part of the labor cost of producing the engine. The value of the raw material in patterns is negligible; and so it could not be assumed that they had any value for preservation to be used again, in the sense that they would become or might become a part of the contractor's outfit for other use. That this claim was regarded by the Supreme Court as for labor, is apparent by the analogy stated between those who make patterns and those who erect scaffolding.

In the other case (United States v. Bartlett), the contractors were to build a breakwater. They owned a quarry, and, to perform their contracts, must open their quarry, get out the stone, transport it and dump it in the water. There could have been here no question of furnishing materials to the contractors, for they owned the materials from the beginning. The question involved was the labor cost of quarrying and hauling the materials. The court held the whole of this was labor performed on the contract. It did not appear that the quarry, so far as stripped, remained of any value for future operation; and it is a proper inference that the work of stripping was performed on this contract just as much as the work of quarrying. The case seems clearly to show an instance of labor furnished directly in the construction of the work.

The decisions of courts other than the Supreme Court and which are chiefly relied upon to extend the benefit of the bond to the "materials" now involved are the so-called powder cases and coal cases (e. g., Powder Co. v. Greenwich, 183 N. Y., 306; City Trust Co. v. United States—C. C. A. 2nd Cir.—147 Fed. 155.) In the former, blasting powder, used in making excavations, has been held to give a liability under the bond. These powder cases stand on reasoning peculiar to themselves. The powder, or similar explosive, is a direct substitute for manual labor, and it is expended or used directly and immediately on the construction work. This statute, like the lien statutes, must extend to excavating as well as to erecting, and unless powder may be considered materials used in that work, there would often be nothing to which the name "materials" could be applied.

The coal cases are one step further away. The powder directly shatters the rock. The coal serves to carry away the broken rock, but does so indirectly, through the intervention of the boiler which makes the steam which operates the engine which lifts the dredge bucket. The powder is material used in the work; the coal is material the use of which contributes to the work.[4] However, it is not necessary to determine whether the coal cases are rightly decided. Some of the claims here allowed were for coal, and error was assigned on

[4] The leading federal coal case, City Trust Co. v. United States, supra, comes under the Act of 1894, unamended; and even under the original act, the Court of Appeals of the District of Columbia reached the opposite conclusion regarding coal (United States v. City Trust Co., 23 App. D. C. 153).

such allowance; but the briefs show that the intention was to raise only subordinate questions, and the general rightfulness of the allowance for coal is not questioned. We refer to these cases only because we must know whether they rest upon principles which require allowances of the supplies involved in this case; and since this case may be well distinguished from them, their correctness need not be determined.

The questions saved for this review, interpreting the assignments by the brief, pertain to claims which may be divided into three classes: one, those for groceries and provisions for the men; two, those for machines or appliances of such a character as to become a part of the contractor's quasi-permanent outfit and as not to be used up or worn out on this job—unless they happened to be; and, three, those for machine or miscellaneous repairs or supplies of a more temporary character.

The Brogan claim was for groceries furnished to the contractor's boarding house. We can not attach any importance to the fact that the character of the country where this work was done made it necessary for the contractor to board its men on the job—in other words, compelled it to give them their board as a part of their pay for their work. Even if there may be distinctions between one who furnishes food consumed by the men in their contractor's boarding house and food consumed by the same men in an outside boarding house, it is not seen how it can be of any importance whether the men agree to board at the contractor's place because it is the only one, or do so for some other reason; nor can there be one rule in a city and another in a wilderness. The provisions, in one case as in the other, either are or are not "labor" or "materials" used in the construction of the work.

Counsel agree that in no case under this statute has the liability been extended to provisions, and that in the cases decided under the State lien statutes, such liability has been denied (Perreault v. Shaw, 69 N. H., 180; Carson v. Shelton, 128 Ky., 248; Luttrell v. Knoxville Co., 119 Tenn., 492, 519;[5] Dudley v. Toledo Co., 65 Mich., 655; Pennsylvania Co. v. Mehaffy, 75 O. St., 432); but it is said they stand on the same basis as the coal for the engine; they provide the energy which makes the machine—in this case, the human machine—do the work. The District Court, while regarding the question as very close, thought this final step in the reasoning could not be avoided. We find a sufficient distinction in the difference between labor and materials. Coal has been allowed as a material; it is expended as a material; it never is and never can be transformed and merged into that labor which is the "labor performed" as distinguished from the "material furnished" for each of which the statute gives a right of recovery. The logic of the coal cases—regardless of its persuasiveness—is that the word "materials" in the statute should be thought to include coal, because the latent energy of the coal was developed into a mere substitute for that human labor which

[5] This case reviews many decisions and carefully classifies many articles now involved. (See pp. 512-520.)

is expressly included in the law, and unless this energy thus put into the work is protected in this way, it is not protected at all. On the other hand, the food for the men never contributes to the work, except after it is transmuted into the form of that labor which, as labor, is protected. It is not to be thought that the statute gives twice a claim for the one thing. In this case, the entire labor right has been satisfied. The contractor paid the men their wages and furnished them their board, and they have no claim. Money that he may have borrowed to pay part of their wages is, on this principle (though not in responsiveness to the name "materials") difficult to distinguish from the food he borrowed—bought on credit—to pay the balance of their wages; but such money loans are not lienable (47 Cyc. 44). Nor, if a claim were to be allowed for food for the men, could we well refuse one for rent of their quarters, special clothing, free tobacco, or anything else which the contractor might have agreed to provide as part of their pay. Indeed, among the items allowed on this claim, we find soap and towels, bedding, matches, kitchen and table furniture, etc. These last named items only illustrate that if, by vague equities or by the supposed liberal policy of the statute, we are led away from the field of direct and immediate use in the construction, we find no place to stop short of what the Supreme Court of New Hampshire called "interminable litigation and confusion" (Perreault v. Shaw, supra). We can not believe that these provisions sold by Brogan constitute "labor furnished or materials used in the construction of the work," save in a sense so indirect and remote as not to be within the fair contemplation of the statute.

While the cases above cited from the State courts denying a lien to board or provision claims are not under the statute now involved, we do not see controlling distinctions, either in the State statutes cited in these cases or in the reasoning of the decisions. In the Federal courts, the point has not been directly decided, but it has been twice argumentatively pointed out that board or provisions are not materials for construction work. In Giant Powder Co. v. Oregon Co., 42 Fed., 470, 475, Judge Deady says, "The food furnished a contractor for his men may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this only in a remote or consequential way or sense. The food does not enter directly into the structure and is not so used." He then distinguishes between this remote use for which there will be no lien, and the more direct use of powder in blasting, or of water in making mortar, or of lumber used in scaffolding, no one of which remains in the final structure, but each of which is so directly used as to support a lien. In United States v. Kimpland, 93 Fed., 403, Judge Thomas was considering this statute in its 1894 form, and he said (p. 406), "Is the board which the contractors have agreed conditionally to pay out of the men's wages, labor or materials supplied in the prosecution of the work? * * * It is considered that the word 'labor' as used in this statute does not admit of such remote and indirect equivalents. It requires the sureties to insure the payment of the visible material that was furnished for direct use and incorporation in the work

* * *. Thereby the sureties had a clear conception of the limits of their liability. They were not concerned to see to it * * * that the persons who furnished stores or food or lodging to the workmen under an agreement by the contractor to pay for the same out of the wages due those benefited should be paid. The contractor was under no such primary duty to the United States. His duty as a contractor and as regards the sureties was to pay the laborers their wages and allow them to buy their board and clothing where they would."

United States v. Bartlett, supra, is clearly a case where a claim was allowed for labor upon the theory that the unpaid wages of the laborers had been assigned to the claimant (see Justice Day's comment on p. 243); and so, although the original claim was for board, the claim allowed was for labor, and the case has no application here. Lybrant v. Eberly, 36 Pa. St., 347, and Bangs v. Berg, 82 Ia., 350, are instances where liens were allowed for the agreed price of labor or materials and board had been made a part of the contract price. In Kollack v. Parchen, 52 Wis., 393, the statute was express.

The second class of items here involved may be typified by the "Rand drills." As a matter of common knowledge, such drilling machines are portable engines operated by suitable power, and intended to be used in one location after another until they are worn out. Their life depends upon the care given to them. It was found as a fact as to these machines that because they had been either so much used or so badly used upon this work or because the business was to be liquidated, the receiver considered them not worth moving and they were abandoned. If the bond is to extend at all to machines, tools and appliances used upon the work, their inclusion must be determined by their inherent character and not by the length of time for which or the manner in which they happen to be used. Such drilling machines become a part of the permanent outfit of the contractor. True, they might wear out sooner than a dredge or a crane or a hoisting engine, but they might outlive any of these things. In our judgment, they can not be regarded as materials used in the construction of the work. Of the same class are many other things found among items allowed. Rope in large quantities, wire cable, anchor chains, etc., are clearly normally a part of the permanent or quasi-permanent outfit of the contractor. They obviously would outlast any short piece of work; and the proper name to give them must be determined by the nature of the materials and not by the length of the job. If, in fact any of these things, like rope, was intended for current consumption in the direct doing of the work, it does not so appear upon this record. Things of this class are not normally intended for specific use and exhaustion upon the work where they are first sent. They are not materials used in the work; they are facilities for doing that work and any other work to which they may be applied.

The third class consists of miscellaneous supplies and repairs for the contractor's plant. This plant consisted of a dredge and its machinery, a drill boat and its machinery, two tender tugs and the boarding house. So far as these supplies may have been specifically

intended for current consumption directly on the work, they are allowable, like the blasting powder, and like the lumber actually consumed in scaffolding or in concrete forms. Of this character would be the drills used in the drilling machines, or the material therefor. The record does not show certainly the amount of these articles, but steel generally described may have been for this purpose. These drills are made to be used up currently. Their life is a matter of days if not of hours. The contractor buys only his current needs on the particular job. The drills are used up in direct and immediate contact with the rock, the removal of which is the "construction of the work," and we are satisfied, by analogy to the powder cases, to regard such drills as materials under the statute.

The great part, however, of the items allowed as supplies and repairs were for the ordinary and current repairs on the machinery and for miscellaneous a-ticles used in the maintenance and operation of the boats and dredges. The articles for outfitting the boarding house (the soap, etc., above mentioned) really belong in the same class. These supply items are of infinite variety, as would be expected when we see that they are not for use directly on the work but are for the maintenance of buildings, boats and machinery in suitable condition for living in the buildings or on the boats, navigating and operating the boats and operating the machinery. As a class, we think they are beyond the statute. We may specify: bolts and nuts, valves, cylinder-heads, electric wire, lanterns, wrenches, files, electric light globes, divers overalls, waste, oakum, packing, grindstones, kerosene, paints, etc. We even find among the items to which specific attention apparently was not called, but which were allowed against the general objection, two type-writer ribbons, five lengths of stove-pipe and three rat-traps. It can not be denied that even these last items may be necessary supplies for the proper keeping of the boats or buildings in habitable condition, but we can not think they are "materials used" in the deepening of St. Mary's River; and this not because they are extreme and striking instances, but because they typify things which are either additions to the contractor's working outfit or are intended to maintain the existing outfit in as good order as possible against the wear and depreciation which would otherwise accrue. We approve generally and apply the rules of separation of items as stated by Judge Webb in United States v. Morgan, 111 Fed., 474, 488.

It results that the judgments in favor of the Pattison Supply Company, the Soo Hardware Company, the George Worthington Company, the Upson-Walton Company and J. P. Brogan, must be reversed. As to the Brogan claim, no new trial will be awarded, since, upon the undisputed facts, there can be no recovery. In each of the other claims just named, the claimant may be able to furnish proof which, under our view of the statute, will show a liability as to some of the items. As to each of these claims there will be a new trial—unless counsel, before the mandate goes down, file a stipulation fixing the amounts recoverable under the rules we have indicated. In that event, the mandate will direct judgments accordingly, and our action will then be final and subject to immediate review. See In re Martin—C. C. A. 6th Cir.—201 Fed., 31, 38.

We see no practical way of considering the judgment below as one at law and still subject to partial review, except to treat it as eleven separate judgments in favor of or against eleven separate claims which for convenience, were united in one group proceeding, one hearing and one judgment, with the same force and effect as if they were consolidated actions. (Diggs v. Railroad—C. C. A. 6th Cir.—156 Fed., 564). No one of the powder or coal claimants complained of the cutting down of its claim to ninety per cent., but each accepted its judgment for that amount; and we affirm the judgments so rendered. There seems to be no insuperable difficulty in allowing part of the judgments to stand, although they are united in one entry with the judgments which are reversed.

The plaintiff in error will recover its costs against the five defendants in error whose judgments are reversed. The four defendants in error whose judgments are affirmed will collectively recover costs against plaintiff in error.

Motion to Stay Mandate.

(Filed Jan. 22, 1916.)

Now comes J. P. Brogan, one of the intervening claimants, defendant in error in the above entitled action, and represents to this Honorable Court that he feels himself seriously aggrieved by the action of this Honorable Court in reversing the judgment rendered in his favor against the plaintiff in error by the consideration of the United States District Court for the Western District of Michigan, also in the rendition of the judgment against him for costs by this Honorable Court, and that he is desirous of prosecuting error to the decision of this Honorable Court to the Supreme Court of the United States, and desires to file a petition for certiorari, that the action of this court may be reviewed in the United States Supreme Court.

Therefore, J. P. Brogan, intervening claimant and defendant in error herein, respectfully moves this Honorable Court to order a stay of the mandate of the judgment of this court for a sufficient time to enable said J. P. Brogan to prosecute his error in the Supreme Court of the United States.

J. P. BROGAN,
Per JOHN A. CLINE,
His Attorney.

STATE OF OHIO,
Cuyahoga County, ss:

J. P. Brogan, being first duly sworn, says that the allegations in the foregoing motion are true as he verily believes.

J. P. BROGAN.

Sworn to before me and subscribed in my presence by the said J. P. Brogan, this 20 day of January A. D. 1916.

[SEAL.]

JOHN A. CLINE,
Notary Public.

Notice.

The National Surety Company, by its attorneys, Tolles, Hogsett, Ginn and Morley, hereby take notice that the above motion has been filed with the Clerk of the United States Circuit Court of Appeals, for the Sixth Circuit, and the same will be submitted to the court for action.

TOLLES, HOGSETT, GINN & MORLEY.
NICHOLS.

Stipulation.

(Filed Feb. 14, 1916.)

It is hereby stipulated by and between National Surety Company, plaintiff in error, and The George Worthington Company, one of the defendants in error, that this court may render judgment against National Surety Company and in favor of The George Worthington Company in the sum of Two Hundred and Fifty Dollars ($250.00), but that said National Surety Company shall recover costs against The George Worthington Company, and that by consent of both parties hereto said judgments may be entered in this Court accordingly and no new trial allowed.

Entered into this 12th day of February, 1916.

NATIONAL SURETY COMPANY,
By TOLLES, HOGSETT, GINN & MORLEY,
Its Attorneys.
THE GEORGE WORTHINGTON COMPANY,
By THOMPSON, HINE & FLORY, *Its Attorneys.*

Entry: Order Staying Mandate.

(Filed Feb. 14, 1916.)

It is hereby ordered that the mandate in this case be stayed until April 1st, 1916.

Stipulation.

(Filed Feb. 18, 1916.)

It is hereby stipulated by and between National Surety Company, plaintiff in error, and The W. M. Pattison Supply Company, one of the defendants in error, that this court may enter final judgment reversing the judgment below in favor of the W. M. Pattison Supply Company and denying right of new trial, which is hereby waived. The W. M. Pattison Supply Company waives all attorney's

docket fees and attorney fees on depositions which have been taxed or are taxable either as costs in the court below or in this court, but judgment may be rendered against National Surety Company for all other costs taxable in connection with the claim of The W. M. Pattison Supply Company herein.

Entered into this 12th day of February, 1916.

NATIONAL SURETY COMPANY,
By TOLLES, HOGSETT, GINN & MORLEY,
Its Attorneys.

THE W. M. PATTISON SUPPLY COMPANY,
By SMITH, TAFT & ARTER, *Its Attorneys.*

Judgment.

(Filed March 17, 1916.)

Error to the District Court of the United States for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered, and adjudged by this Court, that the judgment of the said District Court in this cause in favor of the Pattison Supply Company, the Soo Hardware Company, the George Worthington Company, the Upson-Walton Company and J. P. Brogan are reversed. As to the Brogan claim, and, pursuant to stipulation filed February 18, 1916, as to the claim of The W. M. Pattison Supply Company, no new trial will be awarded. Pursuant to stipulation filed herein February 14, 1916, judgment is hereby rendered against the National Surety Company and in favor of The George Worthington Company in the sum of Two Hundred and Fifty ($250.00) Dollars. As to the claims of the Soo Hardware Company and the Upson-Walton Company a new trial is awarded. The judgments in favor of Pittsburgh & Buffalo Company, Hanna & Company, Pluto Powder Company, and George Kemp are affirmed. The plaintiff in error will recover its costs against the five defendants in error whose judgments are reversed. The four defendants in error whose judgments are affirmed will collectively recover costs against plaintiff in error.

United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of National Surety Company, etc., vs. United States of America, etc., No. 2651, as the same remains upon the files and records of said

United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 24th day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/24/16. A. M.]

341 *Petition for Writ of Error and Order of Allowance.*

(Filed April 27, 1916.)

#2651.

THE NATIONAL SURETY COMPANY, Impleaded with The Standard Contracting Company, Plaintiff in Error,
vs.
JOHN P. BROGAN, Defendant in Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:,

Considering himself aggrieved by the final decision of the United States Circuit Court of Appeals for the Sixth Circuit in rendering judgment aganst him in the above entitled case, the defendant in error, John P. Brogan, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and prays an order fixing the amount of a bond for costs. Assignment of error is filed herewith.

JOHN P. BROGAN,
Per JOHN A. CLINE,
His Attorney.

Order of Allowance.

United States Circuit Court of Appeals, Sixth Circuit.

342 Let the writ of error issue upon the execution of a bond by John P. Brogan to the plaintiff in error above named in the sum of $250.00.

ARTHUR C. DENISON,
Judge of the United States Circuit Court of Appeals for the Sixth Circuit.

Assignment of Errors.

(Filed April 27, 1916).

Now comes John P. Brogan and files herewith his petition for a writ of error and sayd that there are errors in the records and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

1. That the United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that said John P. Brogan was not entitled to a lien under the Act of Congress of August, 1894 amended February 24, 1905, for groceries and supplies which he

furnished directly to The Standard Contracting Company, a contractor for public work of the United States, which contractor had given a bond conditioned that said contractor should make
343 payments to all persons "supplying it material and labor in the prosecution of work."

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that said bond given by The Standard Contracting Company with the plaintiff in error as surety should be strictly construed.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that the bond so given by a contractor to persons supplying him labor and material in the prosecution of work does not cover materials unless they are "used" in the prosecution of the work.

4. The said United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that the Court should not consider the conditions and circumstances surrounding the parties at the time of the performing of the contract, and that the place where the work was to be performed was not to be considered in determining whether or not the lien obtained in favor of the defendant in error.

5. The Circuit Court of Appeals for the Sixth Circuit erred in rendering judgment for the plaintiff in error, the National Surety Company, and rendering judgment against the defendant in error, John P. Brogan, for the costs.

344 6. The Circuit Court of Appeals for the Sixth Circuit erred in reversing and holding for naught the judgment rendered by the District Court of the United States, for the Northern District of Michigan, Eastern Division, in favor of said John P. Brogan.

7. There are other errors apparent upon the inspection of the record.

Wherefore, John P. Brogan, the defendant in error, prays that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit be reversed and vacated, and that said United States Circuit Court of Appeals for the Sixth Circuit be directed to issue its mandate to the District Court of the United States, for the Northern District of Michigan, Eastern Division, directing said latter court to enter judgment in favor of defendant in error, John P. Brogan, against the plaintiff in error, the National Surety Company, and The Standard Contracting Company for the sum of Four Thousand, Six Hundred Thirteen and 87/100 ($4,613.87) Dollars, together with interest thereon from the rendition of said judgment to the present date at the rate of six (— %) per cent per annum, and for the costs.

JOHN A. CLINE,
Attorney for Defendant in Error.

345 STATE OF OHIO,
Cuyahoga County, ss:

John A. Cline being first duly sworn upon oath says that he is attorney for John P. Brogan and that the facts stated in the foregoing assignment of errors are true as he verily believes.

JOHN A. CLINE.

Sworn to before me and subscribed in my presence by the said John A. Cline this 26th day of April, 1916.

[SEAL.] J. C. LOGUE,
Notary Public.

Bond.

(Filed May 3, 1916.)

Know all men by these presents, that we, John P. Brogan, as principal, and Fidelity & Deposit Company of Baltimore, Md., a corporation, as sureties, are held and firmly bound unto The National Surety Company, in the full and just sum of Two Hundred, fifty and No/100 dollars, to be paid to the said The National Surety certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs,
346 executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said court, between The National Surety Company and John P. Brogan, a judgment was rendered against the said John P. Brogan for the costs and the said John P. Brogan having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The National Surety Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said John P. Brogan shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] JOHN P. BROGAN,
FIDELITY & DEPOSIT CO. OF MD.,
By PAUL M. MILLIKIN,
Attorney in Fact.

Sealed and delivered in the presence of
WM. B. HUESMAN.

347 Approved by
ARTHUR C. DENISON,
United States Circuit Judge for the Sixth Circuit.

May 3, 1916.

348 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals

before you, or some of you, between The National Surety Company Plaintiff in Error and John P. Brogan, Defendant in Error a manifest error hath happened, to the great damage of the said John P. Brogan as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3rd day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

Allowed by
ARTHUR C. DENISON,
United States Circuit Judge, Sixth Circuit.

May 3, 1916.

Filed May 3, 1916. Wm. C. Cochran, Clerk.

349 UNITED STATES OF AMERICA, *ss:*

To The National Surety Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein John P. Brogan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arthur C. Denison United States Circuit Judge, Sixth Circuit, this 3rd day of May, in the year of our Lord one thousand nine hundred and sixteen.

ARTHUR C. DENISON,
United States Circuit Judge for the Sixth Circuit.

350 On this 4th day of May, in the year of our Lord one thousand nine hundred and sixteen, personally appeared be-

fore me, the subscriber, John A. Cline and makes oath that he delivered a true copy of the within citation to Tolles, Hogsett, Ginn & Morley, attorneys for the National Surety Company.

JOHN A. CLINE.

Sworn to and subscribed the 4th day of May, A. D. 1916.

M. A. PATTERSON,
Notary Public.

351 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of National Surety Company, etc. vs. United States of America, etc., No. 2651, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof, together with the original writ of error and citation.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 6th day of May, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

352 In the Supreme Court of the United States, October Term, 1915.

No. 1021.

JOHN P. BROGAN, Plaintiff in Error,
vs.
THE NATIONAL SURETY COMPANY, Defendant in Error.

Statement of Points Relied on by Plaintiff in Error and Designation of Parts of the Record Necessary to the Consideration Thereof.

First.

Now comes John P. Brogan, the plaintiff in error, and represents to the Court that the points on which he intends to rely upon the hearing of said action are as follows:

First. That the United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that John P. Brogan, the plaintiff in error, was not entitled to a lien under the Act of Congress of August, 1894, amended February 24, 1905, for groceries

and supplies which he furnished directly to The Standard Contracting Company, a contractor for public work of the United States, which contractor had given bond conditioned that the contractor should make payments to all persons "supplying it material and labor in the prosecution of the work."

Second. The United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that the bond given by The Standard Contracting Company with the plaintiff in error as surety should be strictly construed.

Third. The United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that the bond so given
353 by the contractor to persons supplying him labor and material in the prosecution of the work does not cover materials unless they are "used," viz: enter into the construction of the work, in the prosecution of the work.

Fourth. The United States Circuit Court of Appeals for the Sixth Circuit erred in ruling and deciding that the Court should not consider the conditions and circumstances surrounding the parties at the time of the performing of the contract, and that the place where the work was performed should not be considered in determining whether the materials furnished by the plaintiff in error might be the subject of a lien in favor of the plaintiff in error against The Standard Contracting Company.

Fifth. The United States Circuit Court of Appeals erred in ignoring Section 44 of the specifications under which the work was performed by the Standard Contracting Company printed on page 296 of the Record.

Sixth. The United States Circuit Court of Appeals erred in that it did not give due consideration to Section 8 of the contract between the United States government and The Standard Contracting Company, which is printed on page 300 of the Record.

Seventh. That the United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the amendment of February 24, 1905, of said statute was intended to and did narrow the effect heretofore given by the United States courts to said statute, in holding that said amendment "has a tendency to bring this statute into harmony with the lien statutes of the states."

Second.

The plaintiff in error, John P. Brogan, hereby designates the parts of the Record which he thinks necessary for the consideration thereof, which are as follows:

First. The claim and intervention of J. P. Brogan appearing on pages 77, 78, 79, 80, 81 and 82 of the Record.

Second. The amended plea of The National Surety Company with notice. Page 83 of the Record.

Third. That part of the findings of fact and the con-
354 clusions of law beginning with the words on page 212 of the Record: "The court thereupon announced the findings of fact and conclusions of law in this case in substance will be as follows:" and omit all the balance of the finding of facts except

section seven on page 214 and section twelve on page 215, which two sections you will please print.

Fourth. Those parts of the conclusion of law designated first, seventh and twelfth appearing on pages 216 and 217 of the Record.

Fifth. The exception by Mr. Garfield on page 218 of the Record.

Sixth. The judgment of the District Court appearing on pages 101 and 102 of the Record.

Seventh. The decision of Judge Sessions printed on page 188, 189 and 190 of the Record.

Eighth. That part of the bill of exceptions set out in the Record beginning on page 110 showing the appearance of John A. Cline for J. P. Brogan and John M. Garfield and C. F. Button for the defendant, with heading.

Ninth. The evidence taken of the witness, Mark A. Copeland, appearing on pages 119 and 120 down to the words: "Mr. Slee, on behalf of the Pluto Powder Company made a statement concerning the nature of its claim generally."

Tenth. The evidence of the plaintiff in error, J. P. Brogan, beginning with the words: "J. P. Brogan groceries claim" on page 179 including all of the pages from 179 to and including 188 of the Record.

Eleventh. The exhibits of J. P. Brogan beginning on page 235 of the Record entitled "Brogan Exhibit 1" including all of the pages from 235 to and including "Brogan Exhibit 21" on page 261 of the Record.

Twelfth. That part of U. S. Exhibit No. 1 beginning on page 286 of the Record including all on page 287 and omitting all of the exhibit except section 44 printed on page 296 of the Record, which section 44 you will please print.

Thirteenth. The contract beginning on page 297 of the Record, beginning as follows: "1. This agreement entered into this 12th day of August, 1908," and all of the matter following on pages 297, 298, 299, 300 and 301 of the Record.

355 Fourteenth. The contractor's bond printed on pages 302 and 303 of the Record.

Respectfully submitted,

JOHN P. BROGAN,
Per JOHN A. CLINE,
His Attorney.

STATE OF OHIO,
Cuyahoga County, ss:

John A. Cline being first duly sworn, on oath says that he is attorney of record for John P. Brogan, the plaintiff in error, and that the foregoing statement presents all of the points upon which the plaintiff in error intends to rely in the argument of said case, and contains the statement of the parts of the record which are necessary for the consideration of the points so intended to be raised.

And said John A. Cline further avers that he did on the — day of May, 1916, serve upon Thomas H. Hogsett of the firm of Tolles, Hogsett, Ginn & Morley, a true copy of the foregoing instrument

by delivering the same to him at his office in the Williamson Building, Cleveland, Ohio.

JOHN A. CLINE.

Sworn to before me and subscribed in my presence by the said John A. Cline this 27 day of May, 1916.

[Notarial Seal, Cuyahoga County, Ohio.]

J. C. LOGUE,
Notary Public.

356 In the Supreme Court of the United States, October Term, 1915.

No. 1021.

JOHN P. BROGAN, Plaintiff in Error,
vs.
THE NATIONAL SURETY COMPANY, Defendant in Error.

To Thomas H. Hogsett:

You are hereby notified that the plaintiff in error, John P. Brogan, shall file in the Office of the Clerk of the Supreme Court of the United States the foregoing designation of the points intended to be relied upon by the plaintiff in error in the argument of said case, together with the designation of the parts of the Record which said plaintiff in error believes necessary for the consideration thereof.

JOHN P. BROGAN,
Per JOHN A. CLINE,
His Attorney.

We hereby acknowledge service of the above notice and designation this 29th day of May, 1916.

THE NATIONAL SURETY COMPANY,
Per THOS. H. HOGSETT,
Its Attorney.

357 [Endorsed:] 1021/25304. No. 1021. In the Supreme Court of the United States. John P. Brogan, Plaintiff in Error, vs. The National Surety Company, Defendant in Error. Statement of Points Relied on by Plaintiff in Error and Designation of Parts of the Record Necessary to the Consideration Thereof. John A. Cline, 1409 Williamson Bldg., Cleveland, Ohio, Attorney for John P. Brogan.

358 [Endorsed:] File No. 25304. Supreme Court U. S., October term, 1915. Term No. 1021. John P. Brogan, Pl'ff in Error, vs. The National Surety Company. Statement of Points to be Relied on and Designation by Plaintiff in Error of Parts of Record to be Printed. Filed June 2, 1916.

Endorsed on cover: File No. 25,304. U. S. Circuit Court Appeals, 6th Circuit. Term No. 488. John P. Brogan, plaintiff in error, vs. The National Surety Company. Filed May 19th, 1916. File No. 25,304.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 171

JOHN P. BROGAN,

Plaintiff in Error,

vs.

THE NATIONAL SURETY CO., Impleaded with
THE STANDARD CONTRACTING COMPANY,

Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

JOHN A. CLINE,

Attorney for John P. Brogan.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 488.

JOHN P. BROGAN,

Plaintiff in Error,

vs.

THE NATIONAL SURETY CO., Impleaded with
THE STANDARD CONTRACTING COMPANY,

Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

JOHN A. CLINE,

Attorney for John P. Brogan.

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Cases Cited.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 488.

JOHN P. BROGAN,
Plaintiff in Error,

vs.

THE NATIONAL SURETY CO., Impleaded with
THE STANDARD CONTRACTING COMPANY.
Defendants in Error.

STATEMENT OF THE CASE AND SPECIFICATION OF ERRORS.

(A) STATEMENT OF THE CASE.

This action was begun in the District Court of Michigan by the Pittsburgh & Buffalo Company as plaintiff in the name of the United States against the defendants, The Standard Contracting Company and The National Surety Company to recover on the contractor's bond for failure of the contractor to pay for labor and material furnished in the prosecution of a government work. The bond was given pursuant to the Act of Congress of August 13, 1894, as amended February 25, 1905.

John P. Brogan, the plaintiff in error in this action, interpleaded and claimed the sum of $4613.87 was due him from the contractor and bonding company for groceries and supplies furnished by Mr. Brogan to the contractor who was conducting a boarding house and commissary for the maintenance of the contractor's men at

the situs of the work. The country was a wilderness and no boarding houses existed there and it was necessary for the contractor to maintain the commissary at which the men boarded in order to secure and maintain workmen for the job. The contractor deducted from the pay of the men a sum sufficient to pay for the board.

The contractor failed, having insufficient assets to pay the claims of his creditors, including the plaintiff in error. The plaintiff in error obtained a judgment against The National Surety Company in the District Court, which judgment was reversed by the Circuit Court of Appeals for the Sixth Circuit, and the plaintiff in error prosecutes this action to this Court to reverse the judgment of the Circuit Court of Appeals and asking that the judgment of the District Court of Michigan be affirmed.

The questions involved, succinctly stated in the form of interrogatories, are as follows:

1. Many groceries and supplies furnished to contractors performing government work, held in a finding of facts by the trial court to have been furnished to the contractor in the prosecution of the work and necessary thereto and wholly consumed therein, be the basis for a lien under the Act of Congress of August, 1894, as amended February 24, 1905, providing for liens for material men and contractors?

2. May one furnishing groceries and supplies to a government contractor who used said supplies in the prosecution of the government work have a lien therefor under the Act of Congress?

3. If materials are furnished to the contractor and wholly consumed by him in the prosecution of the work, are these materials sufficient to be the basis for a lien

whether or not they actually were "used" in the sense of entering and becoming a part of the finished structure?

4. If the government work is carried on in a wilderness remote from cities or inhabited dwellings, where it is impossible to obtain accommodations in boarding houses or to secure supplies, may the character of the country be taken into consideration in determining whether or not the materials furnished to and used by the contractor in carrying on the government work, may be the basis for a lien in favor of a person furnishing said supplies?

5. Where a trial court in a finding of facts has found that certain materials were furnished to a contractor in the prosecution of the government work; that the materials so furnished were necessary to the prosecution of the work; that the materials so furnished were wholly consumed in the prosecution of the work—and there is no evidence to contradict—do these findings of fact control the determination of the question?

6. The contractor received and used the groceries and supplies in the boarding camp conducted by him for his men in the wilderness; it deducted from the pay of the men an amount, to-wit, $22.50, per man per month in payment for board furnished by the contractor to his men out of the supplies furnished by the grocer; the contractor also received pay from the government for the work of the men—that is, he received the supplies of the grocer, the wages of the men and pay from the United States. Under these circumstances may a grocer have a lien (a) as for materials furnished; or, (b) as for labor furnished; or (c) as for wages assigned?

7. Should the Act of Congress providing for a lien to contractors and material men be liberally construed in favor of the person furnishing material?

8. May a bonding company for hire which received the benefit of the material furnished to its contractor be compelled to make payment for the material without regard to minor technical objections; and is its contract to be liberally construed in favor of a material man?

9. May the bond furnished by the contractor and the contract signed by the contractor be taken into consideration in determining whether a lien may attach under given circumstances, as well as the Act of Congress providing for liens?

(B) SPECIFICATION OF ERRORS.

The plaintiff in error herein sets forth the errors relied upon and intended to be urged in the arguments of this case, and upon which a reversal of the judgment of the Circuit Court of Appeals is asked, and are as follows:

1. The Court of Appeals erred in deciding that John P. Brogan was not entitled to a lien under the Act of Congress of August, 1894, as amended February 24, 1905, for the groceries and supplies which he furnished to The Standard Contracting Company, a contractor to construct a public work for the United States, which materials were used by the contractor in the government work and were necessary to the government work.

2. The Court of Appeals erred in holding that groceries and supplies furnished to a contractor for government work may never become the subject of a lien, and that under no circumstances could groceries and supplies become the basis for a lien.

3. The Court of Appeals erred in holding and ruling that material must be "used" in the sense of entering the finished structure before it can be or may be the basis of a lien.

4. The Court of Appeals erred in holding that the character of the country and the place where the work is to be performed may not be considered in determining whether or not materials of a given kind are necessary to be used in the construction of the work.

5. The Court of Appeals erred in holding that the bond of the contractor furnished by the bonding company for hire should not be liberally construed in favor of the material man, but that the rule of *strictissimi juris* applied in favor of the bonding company.

6. The Court of Appeals erred in holding and deciding that the amendment to the Act of Congress in 1905 specifically required the material furnished government contractors must be "used," that is, enter into and become a part of the public work, to be the basis for a lien.

7. The Court of Appeals erred in holding that the plaintiff in error did not furnish materials within the meaning of the Act.

8. The Court of Appeals erred in holding that the plaintiff in error did not furnish labor within the meaning of the Act.

9. The Court of Appeals erred in holding that Mr. Brogan was not entitled to a lien for wages assigned to him.

10. The Court of Appeals erred in reversing the judgment of the District Court.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 488.

JOHN P. BROGAN,
Plaintiff in Error,

vs.

THE NATIONAL SURETY CO., Impleaded with
THE STANDARD CONTRACTING COMPANY,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Standard Contracting Company received an award from the United States for deepening a channel in a portion of St. Mary's River, Michigan, and entered into a contract to do the work pursuant to the award. It gave to the United States a bond with The National Surety Company as surety in the sum of Twenty-five Thousand ($25,000.00) Dollars, as required by the Act of Congress of August 13, 1894, as amended February 24, 1905. Before completing the work, the contractor failed and the job was finished by the receiver. The United States did not begin action on the bond, but suit was commenced by the Pittsburgh & Buffalo Company as plaintiff in the name of the United States against the contractor and surety as defendants, and the plaintiff in error, John P. Brogan, intervened. The suit was based on the bond and this plaintiff in error claimed the sum of Forty-six Hundred Thirteen and 87/100 ($4613.87) Dollars with interest from June 23, 1911.

The *contract* between the government and The Standard Contracting Company, among other things, provided as follows, (Record, p. 44):

> "44. Accommodations.—The contractor shall furnish regularly to inspectors, on the dredge where practicable, a suitable room for office and sleeping purposes, and *shall furnish to the inspectors, and when required, to other United States agents visiting the work or assisting in its supervision, suitable board satisfactory to the engineer, and equal to any furnished any of the contractors' agents,* such accommodations to be paid for by the United States at special rates, as follows: $0.60 per day or $0.20 per occasional meal per person. Accommodations on shore shall include transportation to and from work."

Also the following clause, record, p. 46:

> "8. The party of the second part (the contractor) shall be responsible for and *pay all liabilities incurred in the prosecution of the work* for labor and material."

The *bond* given by The Standard Contracting Company with the defendant in error, The National Surety Company, as surety, among other things, provided as follows (Record, p. 48):

> "Now therefore, if the above bounden, The Standard Contracting Company shall and will, in all respects, *duly and fully observe and perform all and singular the covenants, conditions, and agreements, in and by the said contract agreed and covenanted by said The Standard Contracting Company, to be observed and performed according to the true intent and meaning of said contract,* and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and *shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided*

for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

The place where the work was to be performed under the contract was in the wilds of Michigan where there were no boarding houses nor hotels; remote from villages—the nearest city being Sault Ste Marie, Mich., more than twenty miles away. The company could not find quarters for the men around there, and was compelled to operate a commissary because of its inability to procure or keep labor without doing so. The labor unions who furnished the men for the work made contracts with the contracting company requiring it to furnish board for all men working on the job. It was a part of the union scale to require the contractor to board the men and to permit it to deduct a stipulated amount from each man's wages to pay for his board. The contracting company conformed to that agreement and the sum of Twenty-two and 50/100 ($22.50) Dollars per month was deducted by the contractor from the wages of each man who worked for the company under this arrangement. Record, pp. 9, 10, 11, 12.

The petitioner in error, John P. Brogan, conducted a grocery store at Cleveland, Ohio, and The Standard Contracting Company ordered and purchased from said Brogan groceries and supplies to the amount of his claim, concerning the amount and the reasonable value of which there seems to be no dispute. Mr. Brogan shipped to the contractor *direct* the supplies ordered, and charged the contractor with them, and the supplies and provisions were furnished to no other person except the contractor. The contractor conducted the boarding house where the men were fed, and the company received the contract

price for the work from the government, it received the groceries, and it deducted from the pay of the men the pay for their board.

The original suit was begun in the United States District Court for the Northern District of Michigan, and was tried at the Soo January 13th to 17th, 1914, Hon. Clarence Sessions district judge presiding, who upon hearing, sitting as a court of law, made the following findings of fact and conclusions of law in favor of this petitioner: (Record, p. 17.)

FINDINGS OF FACT.

"Seventh. The claimant, J. P. Brogan, sold and delivered to the defendant, The Standard Contracting Company, groceries and provisions of the value of $4,613.87. The evidence shows that the public work under construction by defendant was located in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses and The Standard Contracting Company was compelled to provide board and lodging for its laborers. The groceries and provisions furnished by this claimant were used by said defendant in its boarding house. They were supplied by said claimant to said defendant in the prosecution of the work provided for in the contract and the bond upon which this suit is based. They were necessary to and wholly consumed in such work."

"Twelfth. The materials supplied by the several claimants above mentioned to the defendant, The Standard Contracting Company, which were used and wholly consumed in the prosecution of the work covered by the contract and bond here in controversy, were of the aggregate value of $27,988.22. The penalty of the bond in suit is $25,000.00, which is approximately 89.32 per cent of $27,877.22."

CONCLUSIONS OF LAW.

"Seventh. The claimant, J. P. Brogan, is entitled to a judgment against both defendants for the sum of $4,121.21, such sum being 89.32 per cent of his total allowable claim ($4,613.87)."

"Twelfth. The claimants are entitled to recover from the defendants their costs of suit to be taxed. Judgment will be entered accordingly."

The opinion of Judge Sessions rendering judgment in the court below is printed in full on pp. 15, 16 and 17 of the record.

The bonding company prosecuted error to the United States Circuit Court of Appeals for the Sixth Circuit, and on November 7, 1915, the case was argued and submitted, and decided January 14, 1916. The Circuit Court of Appeals reversed the judgment rendered by Judge Sessions, the opinion of the Court of Appeals being reported in 228 Fed. Rep., pp. 583-585.

The petitioner in error, Mr. Brogan, thereupon prosecuted error to this court seeking a reversal of the judgment of the Circuit Court of Appeals and an affirmance of the judgment of the District Court.

(The *italics* in this brief are inserted by counsel.)

QUESTIONS OF LAW.

The plaintiff in error claims a lien for the following reasons:

1st. That the supplies and provisions furnished to the contractor direct were materials supplied in the prosecution of the work and necessary to it; *or*

2nd. That the provisions furnished were substitutes for labor as is coal or powder, and that the plaintiff in error is entitled to a judgment as for labor; *or*

3rd. That the plaintiff in error is entitled to a lien for wages assigned to him because there were acts consented to by the men employed on the job which amounted to an assignment of their wages to Mr. Brogan, in that an amount of the wages sufficient to pay for boarding the men was withheld by the contractor from the men with their consent, and therefore the plaintiff is entitled to the money so withheld.

FINDING OF FACTS CONTROL.

The contracting company could not have completed the work without running a boarding house of its own. The finding of fact by Judge Sessions is of great force and effect, and that finding was that the contractor was compelled to provide board and lodging for its laborers; that the provisions were furnished by Mr. Brogan to the contractor in the prosecution of the work and they were necessary to the work, that they were used and wholly consumed in the prosecution of the work. (Record, p. 17.) There is no evidence tending to rebut this finding.

The findings of fact have the same effect as the verdict of a jury, and the Supreme Court does not revise them but merely determines whether they support the judgment.

United States vs. F. & G. Co., 236 U. S., 512, 527, citing revised statutes Sections 649, 700, 1011 (amended by act of Feb. 18, 1875, Chap. 80, Sec. 1, 18 Statutes at large 318, Comp. Stat. 1913, Sec. 1587, 1668, 1672);

Norris vs. Jackson, 9 Wall., 125, 128;
St. Louis vs. The Ferry Co., 11 Wall., 423, 428;
Dickinson vs. Planters Bank, 16 Wall., 250, 257;
Mercantile Mutual Ins. Co. vs. Folsom, 18 Wall., 237, 248;
British Queen Mining Co. vs. Baker Silver Mining Co., 139 U. S., 222;
Stanley vs. Schwalby, 162 U. S., 255;
Evan vs. State Natl. Bank, 141 U. S., 107;
Louisville vs. Halliday, 154 U. S., 657;
McKinley Creek Min. Co. vs. Alaska United Min. Co., 183 U. S., 563.

We therefore urge that since the finding of fact by the trial court is that the materials were supplied in the prosecution of the work and were necessary to it, the Circuit Court of Appeals erred when they overruled the finding of the trial court. The reasoning of Judge Sessions seems not only to be logical, but in full accord with the rulings of the higher courts. His opinion is not defensive or explanatory and needs no argument to reconcile it with the decisions of the Supreme Court.

There is no evidence to rebut, qualify or deny the finding of fact, but all of the evidence supports this finding of fact, and judgment should be rendered upon it for the plaintiff in error.

THE MATERIALS FOR WHICH LIENS ARE ALLOWED.

We have found no case decided by this court which directly determines whether or not provision supplies furnished to a contractor who boards its men while conducting public work are "materials or labor furnished in the prosecution of the work." There are many de-

cisions, however, of this court and lower federal courts which have intimated the character of materials for which a lien may be had.

The federal courts have allowed claims for oil, coal, powder, fuses, etc., which are but a substitute for labor, and this court has allowed wharfage, cartage, patterns, towage, car rentals, freight, tracks, railroad equipment, and scaffolding as materials and supplies furnished in the prosecution of the work.

The federal courts many times have rendered decisions holding uniformly—until the decision of the Court of Appeals in this case was rendered—that the materials need not enter into the construction of the work, and that if the materials were supplied to the contractor and were necessary to the work, the person furnishing materials should have a lien. In *Giant Powder Co. vs. Oregon Pacific R. R. Co.*, 42 Fed., 470, the question of whether material must be "used" or enter into the structure to be the subject of a lien, was considered, and the court held it need not be "used" and says, p. 475:

> "The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work; but this is only so in a remote and inconsequential way or sense. The food does not enter directly into the structure and is not so used. Mason work may be done on a road in a dry country or season, when large quantities of water must be hauled many miles for the preparation of the necessary mortar. Upon the completion of the structure and the hardening of the mortar, the water has as thoroughly disappeared as the powder after the blast. Again, lumber may be used in the construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building nor, so to speak, become a part of it. But, in my judgment

both it and the water have been used in the construction of the building and the mason work within the meaning of the lien law and the purpose for which it was enacted."

In that language the court seemed to intimate that food furnished a contractor for his workmen is of the same quality as water in mason work and lumber in scaffolding, and that were the question one of whether or not the food so consumed were used in the prosecution of the work, the court would hold it to be a material similar to water in mason work and lumber in scaffolding.

That case and other cases hereinafter cited hold that powder and coal are either materials or labor which enter into the prosecution of the work and for which liens are allowed. Powder, coal, gasoline or gas, or steam generated by them in man-made machines, do no more than the food which enters into the human machine and renders it capable of producing labor. Followed to its logical conclusion, food, coal, powder, gasoline, gas and energy to be exerted in the form of labor are a substitute for labor, and whether allowed as labor or materials, there is no difference in sound reason or morals why all of them should not be allowed.

In *Sears vs. Mahoney*, 66 Fed., 860, the syllabus especially reserved the question as to whether or not food furnished for mules was a material for which a lien could be obtained under the state mechanic's lien statute, and this appears to be the only case in the federal court approaching this subject. Even under the mechanic's lien statute which is to be narrowly construed and not liberally construed as is the federal act, the question was reserved in this early case.

In *City Trust Safe Deposit & Surety Co. vs. The United States,* 147 Fed. 155, the question involved was whether the bond was broad enough to protect one who had furnished coal to a contractor for use in operating hoisting or pumping engines on a job where the bond was given pursuant to a statute. The court says on p. 156:

> "But no especially liberal construction is required to bring the material supplied in this case within the protection of the Act. The labor expended by men in wheeling barrows of material from the point of receipt to the place where it is used; in working hand pumps to clear an excavation of water; in turning cranks of a hoisting derrick so as to raise materials to a proper elevation—all such labor is so manifestly labor in the prosecution of the work, that no one could have the hardihood to contend that it is not within the express terms of the statute. If the contractor, whether for the purposes of economy or expedition, elects to do this work by the power of steam, instead of power of human muscle, it is difficult to understand how it can be logically contended that such power is not supplied in the prosecution of the work, or that the cost of the coal which produced it should not be equally within the protection of the same statute."

On page 158 the court refers to the "powder cases" which hold uniformly that dynamite or giant powder used in blasting rock and excavating earth so as to complete a particular improvement, and which were wholly consumed in the performance of the work, are distinguishable from the engine, boiler, picks and shovels which are part of the permanent plant, and while used in the performance of the work, survive its performance and remain the property of the owner.

In the case of *United States vs. The Massachusetts Bonding & Insurance Co.*, 198 Fed., 923, the court found that substantially all the materials furnished to the contractor went into the permanent structure, which was a building, and that all of these materials being expressly required for the performance of the contract, that the defendant was liable on the bond without regard to whether or not they constituted fixtures.

The case of *Illinois Surety Co. vs. John Davis Co.* was decided June 4, 1917, by the Supreme Court and is reported in "United States Supreme Court Advance Opinions" for July, 1917, p. 614. The fourth paragraph of the syllabus states that "claims for rental of cars, track, and equipment used in the construction of a public work and for the expense of loading the plant and the freight thereon to and from the site of the work are for labor or materials within the meaning of the bond given conformably to the Act of February 24, 1905, to secure prompt payment to all persons furnishing labor or materials in the prosecution of the work."

In this last word of the Supreme Court, this Court, extending the rulings which heretofore have been made, has included as material and labor those items which no state court or federal court up to this case has allowed. This court in its decision, has announced that a bond given to secure the payment for materials and labor furnished in the prosecution of the work means just what it says, and that no technical interpretation will be given to the statute or the bond, but that persons who supply material and labor for government work will not be disappointed when they present their claims for payment.

The United States, having required the bond to be given for the protection of material men and laborers, through its various authorities constituted for the purpose of enforcing the law, intends to see to it that any bonding company who undertakes for a consideration to secure the payment of claims for material and labor must make good.

STATES' DECISIONS ARE LIBERAL.

Nearly every state has a mechanic's lien law, and the courts of the various states hold that these lien laws should be strictly construed, and frequently the construction by the state courts is more liberal than that of the Circuit Court of Appeals in this case in construing a statute which the Supreme Court of the United States has held time and again should be liberally construed.

Lybrandt vs. Eberly, 36 Pa. St. 347. Plaintiff engaged his hands at a certain sum per day and board, and the plaintiff claimed a lien. The Court says:

> "The boarding of the hands seems to have been a part of the compensation to be paid for the work and labor in the erection of the house, and therefore the cost is a proper item in the claim for a lien."

In the case at bar the board furnished was part of the wages—for the wages were deducted for the board furnished.

In *Bangs vs. Berg,* 82 Iowa, 350-353, it was stated that the plaintiff sunk a well and furnished necessary materials and a pump. For that he was to be paid in money and in board, and the court held that one was as much a part of the contract price as the other.

Kallock vs. Parcher, 52 Wis., 393:

"The laws providing for a lien in favor of persons furnishing supplies to men engaged in logging includes the board of the men furnished at a hotel in a city several miles from the place where they are at work."

The following authorities upheld liens for materials, the right to which was questioned by the Circuit Court of Appeals in this case.

Coal and gasoline for generating power; dynamite for blasting; lubricants; lighting materials; materials for erecting a tool house. *Johnson vs. Starrett,* 127 Minn., 138.

Lumber for shoring up concrete forms: *Moritz vs. Lewis Construction Co.,* 146 N. W. 1120 Wis.) *Chicago Lumber Co. vs. Douglas,* 89 Kan., 308. *Empire State Surety Co. vs. Des Moines,* 152 Ia., 531.

Powder: *Schaghticoke Powder Co. vs. Ry.,* 183 N. Y., 306.

Lard oil for pipe threads; plaster for soldering joints; insulated wire for drop lights; soap stone to smooth inside of iron pipes to facilitate pulling wires through them. *Pac. Sash & Door Co. vs. Bumiller,* 162 Cal., 664.

Electricity furnished for power and light: *Grants Pass. Bkg. Co. vs. Enterprise Mining Co.,* 113 Pac. R. 859 (Oregon).

Timber; lumber; iron for cofferdam: *Barker Stewart Co. vs. Marathon Paper Mills Co.,* 146 Wisc. 12.

Money advanced to pay freight: *Barker Stewart Co. vs. Marathon Paper Mills Co.,* 146 Wisc., 12.

THE BOND MUST BE LIBERALLY CONSTRUED.

The bond is not to be strictly construed, this court has often held, as are the state mechanic's lien laws. This court has held under a constructive and statesmanlike course of ruling that the Act of Congress was intended to give actual and substantial—not merely theoretical—protection to those who furnished materials and labor.

The decisions of the Supreme Court and the lower federal courts—except the Circuit Court of Appeals in this case—hold that the bond in this class of cases should be liberally construed, and the very best authority—this court—holds that the strict construction rule which applies to the ordinary surety is not the rule which applies to a surety for hire. The rule of *strictissimi juris* which applies to the ordinary surety does not apply to bonding companies. The bonding companies for a profit take a chance upon the faithful performance by the principal of the things required by him to be done. If they win, all well and good; if they lose, they cannot hide behind the rule of strict construction.

U. S. F. & G. Co. vs. Golden Pressed & Fire Brick Co., 191 U. S., 416-426;

U. S. for use of Hill vs. American Surety Co., 200 U. S., 197, 202;

Atlantic Trust & D. Co. vs. Laurinburg, 90 C. C. A. 274; 163 Fed., 690;

Baglin vs. Title Guarantee & Surety Co., 166 Fed. 356;

U. S. Fidelity & G. Co. vs. United States, 102 C. C. A., 178 Fed., 692;

U. S. use of Delaware Hdwe. Co. vs. Lynch, 192 Fed., 364.

In *Hill vs. American Surety Co.*, 200 U. S., 197, the Supreme Court approves the decision in *U. S. F. & G. Co. vs. The Golden Pressed Brick Co.*, 191 U. S., 416-426 wherein it says:

> "The rule of *strictissimi juris* is a stringent one and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the sub-contractor with a view of furthering the beneficent object of the statute."

In that case the Supreme Court held that under a proper interpretation of the statute, one who furnished material and labor to a sub-contractor was entitled to a lien, although he did not come within the strict wording of the bond which provided that the contractor should pay all persons furnishing *him* (the contractor) the labor and material.

In *Equitable Surety Co. vs. United States to the use of McMillan & Son*, 234 U. S., 448, the syllabus is:

> "Changes in a contract for the erection of a public school building, involving the re-location of the building, and necessitating a change in the grade *though not contemplated in such contract and made without the knowledge and consent of the surety on the contractor's bond given conformably to the Act of February* 28, 1899, do not release the surety from his obligation under such bond to pay promptly all persons supplying the contractor with labor and materials in the prosecution of the work,—at least so far as their labor and materials are supplied in accordance with the original contract."

The bond sued on in the above case was given pursuant to the Act of Congress which provided that any person entering into a formal contract with the District of Columbia for the construction of any public building, before commencing work, should execute a penal bond; with the additional obligation that the contractor shall promptly make payments to all persons supplying him or them labor in the prosecution of the work as provided for in such contract.

This act of May 28, 1899, is substantially the same as the statute of 1894 under which the bond in the case at bar was given. The court says on p. 455:

> "In *United States Fidelity & G. Co. vs. Golden Pressed & Fire Brick Co.*, 191 U. S., 416; and United States to the use of *Hill vs. The American Surety Co.*, 200 U. S., 197, 203, this court adopted a reasonably liberal construction of the Act of 1894, in view of the fact that it was evidently designed to furnish the obligation of a bond as a substitute for the security which might otherwise be obtained by attaching a lien to the property; such lien not being permissible in the case of a government work."
>
> "It seems to us that the construction given to the act in the case of 92 Fed. is correct, and that it applies equally to the Act of 1899 under consideration; and that this act like the other should receive a reasonably liberal interpretation in aid of the public object whose accomplishment is so evidently intended." * * *
>
> (p. 456)
>
> "The public is concerned not merely because laborers and material men, (being without the benefit of a mechanic's lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid."

Mr. Brogan, knowing that the material he furnished was to go to and for the benefit of government work at St. Mary's River, Mich., had the right to assume that the bond given would protect him; and if the bond, which is the government guarantee that the material shall be paid for, had not be given, it is probable that the materials would not have been furnished by Mr. Brogan.

In *Mankin vs. Ludowici-Celadon Co.*, 215 U. S. 535, the court even broadened the decision in the *Hill case*, and held that those who furnished material to a sub-contractor were entitled to a lien and the protection of the bond, although the sub-contractor had been paid in full. In other words, it made it the duty of the principal contractor to see that the laborers of the sub-contractor were paid in full for their labor.

In the case of the *Title Guaranty & Trust Co. vs. Crane Co.*, 219 U. S. 24, the Supreme Court approved the language of the court in *American Surety Co. vs. Lawrenceville Cement Co.*, 110 Fed. 717, where it was held that the Act of August 13, 1914, which required the bond of a contractor for government work to be conditioned that he will promptly make payments to all persons "supplying him labor and material in the prosecution of the work" should receive liberal construction necessary to effect its purpose. The syllabus is:

> "It is not to be strictly limited, like mechanic's lien statutes, so as to protect only those supplying labor or materials which add to the value or improvement of the structure; nor on the other hand should it be extended to claims for labor or materials which only incidentally related to the prosecution of the work, as the construction or permanent improvement of the plant or equipment of the contractor, which are capable of use in other work, or to the

> ordinary claims of a public carrier for freight for which the law gives a lien; but this limitation does not apply to those making incidental repairs to equipment, or to truckmen or others who transport materials for short distances, and who, although having a lien, are not expected, in the usual course of business, to exact payment before delivery."

The grocery keeper has no common law lien upon any property of the individual to whom he furnishes his material, and therefore we claim that the above decision applies with greater force to him than to one who has a common law lien and does not exercise it.

In *City Trust etc. vs. United States*, 147 Fed. Rep. 155, the Court says:

> "The Act of Congress and the bond given under it are susceptible of a more liberal construction than the lien statute referred to, and they should receive it."

THE WORD "USED"—ITS SIGNIFICANCE.

The Circuit Court of Appeals held that in order to be the foundation for a lien, the materials must be "used" in the prosecution of the work,—that is, become a part of it,—and bases its decision upon the wording of the amendment to the Act of Congress which varies from the original Act by the insertion of the word "used" in one clause of the Act. The Act of 1894 provided that the bond given to the United States to secure the completion of the contract should have the "additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or material in the prosecution of the work." The

statute was amended in 1905 to provide that the United States had the exclusive right to begin the action, and that when the action was begun by the United States, other persons might intervene and recover if they had "furnished labor or material *used* in the construction or repair of the work."

The amended and original Acts also further provide as follows:

> "If no suit should be brought by the United States within six months from the completion and final settlement of the said contract, then the person or persons *supplying the contractor with labor and material shall* * * * have a right of action and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which the contract is to be performed and executed, etc."

It will be claimed and the decision of the Circuit Court of Appeals shows that large significance is placed upon the word "used" in the amended Act. This suit, however, was not begun by the United States, and the word "used" not being found in the portion of the Act providing for the right of action by any person, under which portion of the Act this action was begun, the word "used," upon which so much importance was placed, has no material bearing in the action. The opinion of the Circuit Court of Appeals is what might be called defensive rather than constructive, because it seems to attempt to reconcile the decisions of the Supreme Court with it, rather than to follow the decisions of the Supreme Court.

In *Illinois Surety Co. vs. United States to the use of J. A. Peeler, et al.*, 240 U. S. 214, the court gives the reason for the amendment of 1905 to the act under discus-

sion and states it was for the purpose of remedying the defect in the Act of 1894

> "by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety, and priority with respect to such demand. Accordingly it was provided that if the United States sued upon the bond, the described creditors should be allowed to intervene, and be made parties to the action, but subject 'to the priority of the claim and judgment of the United States.' And it was only in case the United States did not sue within the specified period that the creditors could bring their action. With this object in view, —to protect the priority of the United States, and at the same time to give a remedy to material men and laborers on the contractor's bond and a reasonable time to prosecute it,—it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement, according to established administrative methods, had determined what amount, if any, was due."

Here then is the reason given for the amendment of the Act. The Circuit Court of Appeals declares the amendment of the Act was to require that material should be "used" in order to constitute the basis for a lien. The Supreme Court here declares that the purpose of the amendment was to give priority to the United States after the completion of its contract, to enforce its rights.

The Circuit Court of Appeals, in deciding this question, did not seem to take into consideration the fact that the contract itself contemplated that board should be furnished to the Government inspectors by the contractor. The contracting company had to get the provisions for this purpose from somewhere and it got them from

Brogan. The *contract* itself provided that the contractor should pay all liabilities incurred in the prosecution of the work for labor and materials. Record, p. 46. The *bond* signed by the surety company provided that the contracting company should perform all the conditions of the *contract between it and the United States,* and that it should pay for all materials *supplied* it. Record, p. 48.

Whatever be the wording of the statute upon the subject, we are suing upon the bond, and in the bond it is provided that the contractor and surety company shall promptly make full payments to all persons *supplying* it labor or materials in the prosecution of the work. There is nothing in the bond or contract about the material being "used." The words in the contract and the bond make the company liable for "liabilities incurred" and for making "full payment to all persons *supplying* it labor or material in the prosecution of the work."

Is it necessary, however, that the materials be *"used"* in the prosecution of the work, or must they simply be "supplied" in its prosecution? The decisions of this court have given to the Act the real and protective meaning intended by Congress, and not the technical and narrow meaning claimed by the bonding company. Under these decisions the materials need not be *used* or *actually enter into* the construction of the work, but the supplying of labor, materials or service reasonably necessary to the completion of the work is sufficient.

In the case of *The American Surety Co. vs. Lawrenceville Cement Co.,* 110 Fed. 717, truckmen and those making incidental repairs on machinery were allowed liens. These items are neither labor nor materials and they did not enter into the construction and were not so "used" except indirectly.

In *United States vs. Ansonia Brass & Copper Co.*, 218 U. S. 452, the court on page 471 says:

> "It was in recognition of the inability of contractors for labor and material to take liens upon the public property of the United States that Congress passed the Act of August 13, 1894, providing for bonds in favor of those who furnish labor or materials in the construction of public works. It was in view of this purpose to provide protection for those who could not protect themselves by liens upon public property that the statute was given liberal construction in this court."

In that case the bond given for the benefit of labor and material was held to be superior to a lien of the United States which it reserved for itself, and the court says on p. 474:

> "In order that such claims may be satisfied, the United States has made provision for their protection by bonds upon which persons may recover damages, so that those who furnish property of which the government receives the benefit shall not entail a loss by so doing. Read in the light of this policy, so manifestly just and proper, and the requirements of this contract and bond, we think that the Government did not intend that the lien which it reserved for itself should be superior to that of contractors for labor and material who had contributed to the work."

Our Supreme Court did not quibble over the word "used" but went directly to the substance of the bond and contract. Those persons *who furnish property of which the government receives the benefit* or those persons who have *contributed to the work* of the government have liens under the bond given pursuant to the Act of Congress. There was no question there as to what became of the material or what kind of material it was, the Supreme Court holds that if the material or labor was

used for the benefit of the government, it should be paid for.

No one will have the hardiness to contend that the government did not receive the benefit of the supplies furnished by Mr. Brogan, and we doubt that the bonding company itself would contend that it did not receive the benefit of these supplies. Can the bonding company therefore hope to escape by a technical rule of construction which the Supreme Court refuses to apply to the United States Government itself? We think not.

In *Title Guaranty & Trust Co. vs. Crane Co.*, 219 U. S. 24-34, affirming the same case, 163 Fed. 168, it was urged that certain claims were not entitled to the benefit of the bond because the services were too remote and were not *used* in the construction of the work. These claims were for patterns, towage, cartage and wharfage, and in regard to them the court says:

> "In these small matters, the objection, if carried to an extreme, would defeat the object of the statute. Those who furnished patterns have as fair a claim to be protected as those who erect the scaffolding."

In *Bartlett vs. U. S. F. & G. Co.*, 231 U. S. 237, a lien was allowed for opening a quarry, stripping the surface and cleaning off the land fifty miles from the place where the contract was to be performed. This work did not enter into the structure, nor were the materials "used" and it probably contributed to the permanent value of the quarry. The stone could not have been secured if the ground had not been stripped and the quarry opened, and the persons who did it were given liens. This case in the lower court is reported in 189 Fed. 340-341 where the court says:

"We find nothing in the statute to support the contention made in this case, that the bond given in accordance with its provisions covered only the labor performed at the breakwater itself. Had there been a quarry at the shore end of the breakwater and had the stone been wheeled out from such quarry in wheelbarrows and dumped, it could hardly be claimed that the laborers who got out the stone, or hauled it, were not engaged in the prosecution of the work. And the fact that the quarry might be fifty miles instead of fifty yards away from the dumping place should make no difference. We think that the bond in question covered the labor which the contractor was obliged to furnish to fulfill his contract with the Government, whether it was performed at the particular place where the stone was finally placed or elsewhere; that the quarrying of the stone, its transportation and dumping should be regarded as a continuous operation, contributing in its entire progress to the prosecution of the work. We therefore hold that the instruction of the trial court that the labor at the quarry was work done in the prosecution of the work, was correct."

MR. BROGAN HAS A LIEN FOR LABOR CLAIMS ASSIGNED.

We claim our case comes within the reasoning of the rule of *Bartlett vs. U. S. F. & G. Co.*, 231 U. S. 237, affirming 189 Fed. 339. In that case a contract was made with one Dunham who, through some arrangement with Hughes Bros. & Bangs, opened a quarry fifty miles from the breakwater where the stone was to be utilized. The contractor maintained a commissary at the quarry from which the men were supplied with provisions and merchandise. An account was kept and the amount equal to the price of the provisions and merchandise was de-

ducted from the wages of the men. This was done with the consent of the men. This court held that Bartlett who maintained the commissary at the quarry was entitled to the benefit of the wages earned by the men in doing the work. His right to a lien was based on an assignment in that the wages so earned were impliedly assigned to him and that such assignment was not prejudicial to the bonding company. There is little, if any, difference in the facts between that case and the case of Brogan, because The Standard Contracting Company, with the consent of the men, deducted $22.50 per month per man for board and this money belonged to Brogan in payment for the supplies furnished to the men. How can the bonding company be prejudiced by the doing of this natural justice? The contractor got paid by the Government, it got the groceries from Mr. Brogan, it got the wages of the men, all to the benefit of the surety company, and it ought not to escape liability under its contract.

In the case of *United States vs. Kimpland,* 93 Fed. Rep. 403, one Mrs. Sica claimed a lien for furnishing board *to the contractor's men.* The contractor conditionally agreed to guarantee the payment for the board to Mrs. Sica. He failed to do so and Mrs. Sica claimed a lien, but the court denied the claim because the board was not furnished *to the contractor* but *to his men* and that there was no obligation in the bond to pay guarantees made by the contractor to third persons. This holding is not in accord with *Hill vs. United States supra* and in *Mankin vs. Ludowici-Celadon Co. supra,* for under the rulings in those cases the obligation of the surety does extend to sub-contractors. The court denied the lien and

the case was remanded for further evidence with this striking language, p. 407:

> "If the contractor had not paid A (the laborer) and it appeared that thereafter the claim was owned by S (the person furnishing the board) justice would require, if nothing in the form of remedies or otherwise, prejudicial to the surety stood in the way, that payment should be made to S and all technicalities should be swept aside to do justice."

Apply this language to our case and it appears that The Standard Contracting Company did not pay the laborers and that the claim for groceries or the board money is owned by the plaintiff herein, and "justice does require," for there is "nothing in the form of the remedy or otherwise prejudicial to the surety" standing in the way, that payment should be made to Brogan the grocer, "and all technicalities should be swept aside to do justice." The syllabus in this case says: "A person furnishing board and lodging to laborers employed on work does not supply either labor or materials within the statute." This was so held because the board was not furnished to the contractor direct but to the labor who were charged for it. In our case the provisions were not supplied to the laborers, but were supplied directly to the contractor, and within every fair meaning of the statute, his surety should be compelled to pay.

THE PLACE WHERE THE CONTRACT WAS PERFORMED IS IMPORTANT.

The work was done in a wilderness where "you could shoot deer in winter" and "fish all you had a mind to in the summer," Record, p. 12; and the finding of fact shows that the place was a comparative wilderness at some distance from any settlement, Record, p. 17. The bonding company in guaranteeing the performance of the contract was bound to know the conditions surrounding the contracting parties. It would become apparent upon the slightest investigation that it was necessary for the contracting company to board its men and therefore it would be liable for provisions and supplies necessary to do so. The bondsman and the contractor knew that the men would have to be fed and housed in some manner, and the contractor's contract with the labor unions required it to board the men, and this fact must have been taken into consideration when the bond was signed. It would be impossible to import employes who could board themselves. There remains no method whereby this work could be performed except to board and lodge the men, which was done by the contracting company.

The Court of Appeals held that the place where the work was to be performed was immaterial, but this court in numerous decisions has held that it is material. Could wharfage and towage be allowed in a country where there was no transportation by water? Would cartage be necessary where the material was at hand? The conditions of every contract depend upon the necessities of the particular climate. What is necessary in the Arctic regions is unnecessary in the torrid zone. What is required in the wilds and wilderness would not be needed in a city. What must be supplied on the water would not be necessary on the land.

The contracting company knew it could not secure men in a wilderness and therefore arranged with the labor unions to furnish the men. The labor unions knew that the men could not find food or shelter in a wilderness and therefore required the company to board them as a condition to sending the men. The United States knew that its inspectors and agents could not find board or hotels at the site of the work and required the contractor to provide board and room for them. Can it then be said that the character of the country where the work was done was immaterial? If the work were done in a city, the men could be obtained and no agreement in regard to board would be necessary. If the work were done in a place where boarding houses existed, the company would not need to board its men. In a lumber camp it is the universal custom for the company to maintain a commissary, and this is necessary to get the work done or keep men to do it.

It is a recognized rule of construction that the courts will place themselves in the position of the parties who made the contract as nearly as can be done by admitting evidence of the surrounding facts and circumstances of the subject matter and the object sought to be accomplished by the contract. Paige on Contracts, Sec. 1123.

A bond or contract of this kind is to be construed in view of the work to be performed and the circumstances surrounding its execution, and by the same rules which govern any other agreement.

Ulster Co. Savs. Trust vs. Young, 161 N. Y. 23;
Gamble vs. Cuneo, 21 App. Div. 413;
Hazard Powder Co. vs. Byrnes, 12 Ab. Prac. 469.

On construing a contract of guaranty, "resort may be had to the circumstances of the transaction and the situation in which the parties stood."

"Evidence of the surrounding circumstances is competent, in order to arrive at the intention of the parties, as declared by the words employed, and as in construing all contracts, the words employed by the parties will be construed in the light of these circumstances."

Bank vs. Laidlaw, 86 O. S. 100.

"While the language of this contract is of doubtful import, it is proper to ascertain the circumstances which surrounded the parties at the time it was made and the object intended to be accomplished."

Mosier vs. Parry, 60 O. S. 388.

"In construing a contract of guaranty, the object should be to ascertain the intention of the parties and in all contracts the words used should be construed in the light of the circumstances surrounding them at the time it was made."

Cambria Iron Co. vs. Keynes, 56 O. S. 501.

"Written contracts may always be read in the light of surrounding circumstances."

Masters vs. Freeman, et al., 17 O. S. 323.

"The situation of the parties when the contract was made, its subject matter and the purposes of its execution, is always material to determine the intention of the parties and when ascertained will prevail over the dry words of the agreement."

Kauffman vs. Raeder, 108 Fed. 171; 54 L. R. A. 247.

"In the construction of a contract, the court will place itself as the contracting parties were placed at the time the agreement was signed, and in view of the facts and surrounding circumstances the court will determine what they intended and the manifest intention will control, regardless of the language of the contract."

Rockefeller vs. Merritt, 40 U. S. App. 666.

CONCLUSION.

We therefore claim that the judgment of the District Court ought to be affirmed and sustained and the judgment of the Circuit Court of Appeals reversed for the following reasons:

First. That the materials furnished by Mr. Brogan were supplied to the contractor direct, in the prosecution of the public work under construction.

Second. The materials were necessary to the performance of the work, for without contradiction it appears that unless the company had purchased groceries and provisions the work could not have been carried on.

Third. The bond, the contract and the statute all provide that a lien shall be allowed for material supplied or furnished in the prosecution of the work, and therefore it need not be "used" or enter into the finished structure.

Fourth. The bonding company has been benefitted by the supplying of the provisions by Mr. Brogan to the contractor, because the contractor has received the labor; it has received the provisions; it has received the wages for the men's board. It has been paid three times and it is no more than right that Mr. Brogan should be paid once.

Fifth. The amount of board was deducted from the wages of the men with their consent and therefore an assignment of those wages in the hands of the contractor resulted in favor of Mr. Brogan who furnished the basis for the board.

Sixth. The place where the contract was performed, being known to all parties, must be taken into consideration in the construction of the contract and the bond, and therefore the conclusion naturally follows that the work could not have been performed without the provisions and supplies furnished, and they should be paid for.

Seventh. The finding of fact by the district court that the provisions and supplies were furnished in the prosecution of the work and were necessary to it and were wholly consumed in it is uncontradicted and not now open to question.

Eighth. The defendant company is a bondsman for hire and is not entitled to a strict construction of its contract.

Ninth. The Supreme Court from the earliest decisions has consistently given a fair, broad construction to the act of Congress and the bonds given under it, to the end that all persons who in any way directly or indirectly aided in the supplying materials or labor for government work should receive their pay, and the same judgment should be pronounced in this case in favor of Mr. John P. Brogan.

Respectfully submitted,

JOHN A. CLINE,
Attorney for John P. Brogan.

No. 271.

JOHN P. BROMAR,
Plaintiff in Error,

vs.

NATIONAL SURETY COMPANY, Impleaded with THE STANDARD CONTRACTING COMPANY,
Defendants in Error.

BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, DEFENDANT IN ERROR.

JOHN M. GARFIELD,
Counsel for National Surety Company.

No. 25,904.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 488.

No. 171.

JOHN P. BROGAN,
Plaintiff in Error,

vs.

NATIONAL SURETY COMPANY, Impleaded with
THE STANDARD CONTRACTING COMPANY,
Defendants in Error.

BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, DEFENDANT IN ERROR.

JOHN M. GARFIELD,
Counsel for National Surety Company.

No. 25,304.

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BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, DEFENDANT IN ERROR.

CONCERNING THE FACTS

While counsel for plaintiff in error has made a fairly comprehensive statement of the facts of this case, we wish to direct particular attention to certain other facts.

The place where the work was to be performed was known as Sailors Encampment, located about twenty-four miles from the Soo. Between April, 1910, and July, 1911, there were engaged at that place an average of about eighty workmen, sometimes as few as twenty and as many as one hundred and ten. The surrounding country was farming country (Testimony of L. T. Brogan, rec. page 9).

There were between five and ten men who boarded themselves. They came from Canada and the neighbor-

ing country (Testimony of L. T. Brogan, rec. pages 10 and 11).

The village of West Neebish was less than five miles from the Encampment and there was another village about three miles away. West Neebish had several hundred inhabitants and some of the workmen came from that village every day (Testimony of Thomas Robinson, rec. page 11).

The goods, as set forth in plaintiff's exhibits 1 to 21 inclusive, were sold by John P. Brogan to The Standard Contracting Company at Cleveland, Ohio, shipped on the Anchor Line Steamship Company to Sailors Encampment, Neebish, Mich. They were sold to the contractor at jobbing prices, i.e. wholesale rates (Testimony of John P. Brogan, rec. pages 13 and 14).

The bond given by the contractor herein in compliance with the Act of Congress provides, as one of its conditions, that the contractor:

> "Shall promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract" (rec. page 48).

The intervening petition of the plaintiff in error, John P. Brogan, alleges (rec. page 3):

> "This claimant and intervenor further alleges that afterwards, to wit, between April 20th, 1910, and June 23, 1911, said John P. Brogan, at the special instance and request of the said The Standard Contracting Company, furnished, *sold and delivered* to said Standard Contracting Company, for use in the said contract, *a large quantity of groceries and supplies*, at certain prices then and there agreed upon between them, which said groceries and supplies were reasonably worth the prices then and there agreed upon,—the agreed prices for all of said material amounting in the aggregate to forty-six hun-

dred and thirteen dollars and eighty-seven cents ($4,613.87), and that the said *The Standard Contracting Company* then and there *promised to pay to said John P. Brogan said sum of money for said groceries and supplies,* an itemized account of said groceries and supplies being hereto attached, made a part hereof and marked 'Exhibit A.' "

The Act of Congress of August 13th, 1894, as amended February 24th, 1905, provides:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any * * * public work * * * shall be required before commencing such work to execute the usual penal bond with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

CONCERNING ERRORS SPECIFIED.

The ten errors specified by counsel for plaintiff in error at pages 3 and 4 of his brief, upon analysis, seem to resolve themselves to this:

1. That the Court of Appeals erred in ruling that groceries and supplies sold by plaintiff in error, Brogan, to The Standard Contracting Company did not constitute either labor furnished or materials used in the construction of the work for which the Act of Congress of August 13th, 1894, as amended February 24th, 1905, gives a right of recovery against the surety on the bond of the contractor, because:

(a) It applied a rule of strict construction not applicable to surety companies which act for pecuniary considerations;

(b) It held the place of performance of the contract to be immaterial as bearing upon the character of the materials used;

(c) It did not allow the claim of plaintiff in error, Brogan, on the theory that the wages of the men had been assigned by them to Brogan.

The errors outlined by counsel for plaintiff in error are again stated in the alternative at pages 9 and 10 of his brief under the heading "Questions of Law," where it appears that he contends first that the groceries sold by Brogan to the Contracting Company should be allowed as materials furnished or, second, as labor furnished or, third, that Brogan became the owner by assignment of the claims of the laborers.

FINDINGS OF FACT.

It is first contended by the plaintiff in error that the findings of fact made by the District Court should have controlled the decision of the Honorable Court of Appeals and cites *U. S. vs. U. S. F. & G. Co.*, 236 U. S., 512, and other cases, to the effect that the Supreme Court does not revise but merely determines whether findings of fact support the judgment.

In answer to this proposition we submit that one of the errors assigned in the Court of Appeals was that the evidence did not support the finding of fact. Exception was taken to the finding of the court in the matter of J. P. Brogan's claim and among the assignments of error at page 310 in the record as filed in the Court of Appeals, are the 19th and 20th assignments of error, as follows:

"Nineteenth. The Court erred in allowing the claim of J. P. Brogan in the sum of $4,613.87 and in finding as a fact that the groceries and provisions furnished by the claimant were necessary to the prosecution of the work provided for in the contract and the bond upon which this action is based and that they were material supplied to the contractor in the prosecution of the work within the meaning of the Act of Congress under which the case was brought; which finding of fact was excepted to at the time on the ground that it was not supported by the weight of the evidence or by any testimony or other competent evidence.

"Twentieth. The Court erred in refusing to direct a verdict in favor of the defendant upon the objection raised by defendant National Surety Company at the close of the testimony offered in support of the claim of J. P. Brogan, on the ground that there was no legal proof under his intervening petition that the materials sold actually went into the work done under the contract alleged and that as a matter of law said materials, by reason of their nature and kind, could not have entered into the work under the contract alleged."

We submit that the rule that the Supreme Court is bound by the findings of fact has no application in cases where exceptions were made to the rulings of the court during progress of trial and where error has been predicated upon the ground that the findings of fact were not supported by the evidence. This conclusion is supported in *British Queen Mining Co. vs. Baker Silver Mining Co.*, 139 U. S., 222, where it was held:

"There being no exceptions to the rulings of the court in the progress of the trial, and the findings of fact by the court being general, the record raises no question open to revision."

If we take the converse of this rule to be true, it must follow that when it appears that exceptions were ta-

ken to the rulings of the court during the progress of trial and the findings of fact were attacked in the Court of Appeals on the ground that they were not supported by the evidence.

Taking another phase of the question, however, we contend that the findings of fact made by the District Court as cited at page 8 of plaintiff's brief may be given their face value and still not warrant the conclusion of law and the judgment rendered thereon. It is merely a finding that groceries were supplied to The Standard Contracting Company and were necessary to and consumed by its workmen in the prosecution of the work provided for in its dredging contract.

We submit that such a finding does not preclude the consideration of the question as to whether groceries so used did or did not constitute labor or materials within the fair meaning and intent of the Act of Congress. We can easily conceive of many other things which could be necessary to the comfort and life of workmen on a contract of this nature which might be by them consumed while in the prosecution of such work, such as clothing, tobacco, whiskey, medicines and the like. It would scarcely be contended, however, that a mere finding that any such commodities were used and wholly consumed by the workmen while engaged in the prosecution of a government contract, that they were materials which came within the term "materials furnished" as used in the Act of Congress and for which it was intended that a right of action be given against the surety on the contractor's bond.

The finding that the groceries were "wholly consumed in such work" was based upon such testimony as that given by the superintendent L. T. Brogan, who

was actively in charge of the work at Sailors Encampment, and testified as follows:

> *"When I said that this material was all consumed in the prosecution of the work, I mean that the men ate the food."* (Rec. page 11.)

We respectfully submit, therefore, that the findings of fact by the District Court did not control in the consideration of this case by the Court of Appeals. It having been assigned as error that the findings of fact were not supported by the evidence, it was certainly proper for the Court of Appeals to go behind the finding of fact and determine as a matter of law whether the conclusions of the court below were justified by the facts of the case. That being true this Honorable Court will consider the facts shown by the record in so far as a consideration of such facts is necessary to a determination of the errors complained of.

DO GROCERIES AND SUPPLIES FURNISHED FOR A CONTRACTOR'S BOARDING HOUSE CONSTITUTE MATERIALS WITHIN THE MEANING OF THE ACT OF CONGRESS?

The Honorable Court of Appeals for the Sixth Circuit, after hearing this case held:

> "Groceries and provisions, furnished to a boarding house of a contractor with the United States, and consumed by his laborers, did not constitute 'labor furnished or materials used in construction of the work,' and payment therefor was not secured by the contractor's bond, given pursuant to Act Aug. 13, 1894, as amended by Act. Feb. 24, 1905, and it was immaterial that the character of the country where the work was done made it necessary for the contrac-

> tor to board its men on the job." (3rd Paragraph of Syllabus, 228 Fed., 577.)

It is now for this Court to say whether upon the undisputed facts of this case the Court of Appeals was right or wrong.

There is no question but that this Court and other branches of the federal court have given a most liberal construction of the Act of Congress in question. Coal and blasting powder have been allowed because they furnish energy which would otherwise have to be furnished by human labor. We question whether they should be allowed as materials and submit that they are allowed only on the theory that they are substitutes for labor, and even those cases which allow coal and powder do not allow food furnished for workmen and as said in *Giant Powder Co. vs. Oregon Pacific Railroad Co.*, 42 Fed., 470, at page 475,

> "The food furnished a contractor for his workmen may be said to be used and consumed in the construction of the road on which they work, but this is only so in a remote and inconsequential way or sense. The food does not enter directly into the structure and is not so used."

It is contended that the decisions of the various states under the construction of their respective mechanics lien laws are liberal and that they go so far as to allow claims for board. We submit that no state case has so decided where the board of the men was not expressly provided to be a part of the consideration for the contract or where the words have had their ordinary meaning enlarged by special statute.

COMMENTS ON DECISIONS ALLOWING BOARD AS A LIEN.

The petitioner cites three cases at pages 16 and 17 of his brief which do not support his contention that board or food should be construed as labor or material under the lien laws.

Lybrant vs. Eberly, 36 Pa. St., 347.

The boarding of the workmen was a part of the consideration agreed to be paid for the work and labor of erecting a house.

In *Banks vs. Berg,* 82 Iowa, 350-353, it was found—

> "For the labor and materials required to be furnished by the plaintiff, *the defendant agreed to board the hands and team engaged in doing the work* and to pay $1.00 for each foot of the depth of the well."

It follows that in these cases there was no question open for consideration. The defendant contracted to pay the board of the workmen and the fodder for the team as a part of the consideration for drilling a well.

As to *Kollock vs. Parchen,* 52 Wis., 393, the quotation in petitioner's brief is exceedingly misleading, for here the word "supplies" had been construed by special statute to include board and fodder. At page 68 as this case is reported in 9 N. W. Rep., the court says:

> "Section 3330, Revised Statutes of 1878, as amended * * *, *declares that the word 'supplies'* as applicable to the counties named in Section 3329, except the County of Marathon and other counties named in the second, *shall be construed to mean feed used for teams and food necessarily used in camp for the support of the men and no other thing,* and that in the County of Marathon and several other counties named, the words '*supplies,* rafting or oth-

> er *material,' shall be construed to mean and include* all rafting or other *materials used by the men and teams* * * * which are usually used by men or teams when so employed, *including food for both* * * * *and all groceries or provisions, clothing and other ordinary articles used by a laboring man or his family while doing any such labor* * * * when the same is furnished to and does apply in payment for labor and services on such logs and timber, and does not exceed the value of such services and labor."

We submit that *Kollock vs. Parchen, supra,* falls far short of supporting the contention made for it by counsel for the petitioner and that in view of the expressed ruling of the Court of Appeals that the repetition of this naked citation is somewhat extraordinary. The fact that statutory construction was thought necessary makes it conclusive that even the Wisconsin courts would not have held the word "materials" used in the lien Act to include board for workmen by judicial construction.

FEDERAL DECISIONS WHICH HAVE CONSIDERED BOARD FOR WORKMEN AS A FOUNDATION FOR A CLAIM UNDER THE ACT OF CONGRESS.

The Federal cases which have considered board for workmen as the foundation for a lien or claim are briefly as follows:

Giant Powder Company vs. Oregon Pac. Ry. Co. et al. (42 Fed., 470).

This decision, rendered in 1890, involved the construction of a state lien law, and allowed a claim for Giant Powder used in the progress of the work as "material," within the purview of the statute. In discussing the claim, the court uses the following language, at page 475:

"Nice questions may arise as to whether material is 'used' in the construction of a road as a tool or plant simply, or so used and consumed as to entitle the furnisher to a lien on the result for its value.

The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work; *but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used.*"

Sears et al. vs. Mahoney et al. (66 Fed., 860).

The action was brought under the Act of Congress of August 13th, 1894, but the principal question involved was the construction of a statute of the State of Louisiana, by virtue of which *a lien was claimed for feed furnished to mules used in working on a levee.* In passing upon the question the court used the following language at page 861:

"* * * *It is doubtful, to say the least, whether one who supplies feed for mules employed by a contractor or by a sub-contractor, is a furnisher of materials used in the erection of work.* I repeat that no lien is claimed under the act of Congress; nor does that Act seem to have intended to create a lien. It seems to merely give a personal action on the bond 'for labor and materials'; and, as stated, it is not clear that Sears & Sons furnished either labor or materials."

The U. S. to the Use of Sica vs. Kimpland (93 Fed., 403).

This was an action under the Act of Congress August 13th, 1894. Ellen Sica kept a boarding-house and furnished board to workmen engaged on a Government contract. She asserted a claim in a suit on the bond of the sureties given pursuant to the Act; the sureties demurred to her complaint. At page 406 the court asks:

> *"Is the board which the contractors have agreed conditionally to pay out of the men's wages, labor or material supplied in the prosecution of the work?"*

And at page 403, in paragraph 1 of the syllabus, answers the question in the negative:

> *"A person furnishing board and lodging to laborers employed on the work does not supply either labor or materials within the statute."*

Bartlett vs. U. S. F. & G. Co. (231 U. S., 237).

This case without deciding the propriety of allowing board furnished to workmen as a claim against the bond, merely says:

> "Under the circumstances of this case, *held that the claims of laborers for wages had been properly assigned to the claimant and clothed him with legal right to maintain an action upon the bond* given under the Act of August 13th, 1894."

The *Bartlett* case was thoroughly considered both in the Court of Appeals (189 Fed., 339) and in the Supreme Court. The question of allowing certain materials under the bond was passed upon. It is fair to assume that if board furnished to workmen had been considered to be a proper claim against the bond of the contractor, either as labor or materials, either this Honorable Court or the Court of Appeals, would have ruled accordingly, instead of going into the question of assignment.

Since the decision of the case at bar by the Court of Appeals it has been followed in *United States ex rel. Samuel Hastings Co. vs. Lowrence et al.*, 236 Fed., 1005, decided by the District Court, Eastern Division, Arkansas, on November 28th, 1916, it was held:

> "The bond of a contractor, constructing a levee under contract with the United States, given under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278, as Amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811

(Comp. St. 1913, Sec. 6923), provided that the contractor should be responsible for paying all liabilities incurred for labor or material in the prosecution of the work. Plaintiff furnished a subcontractor feed for mules used in building the levee. *Held* that, while the act should be liberally construed as a mechanic's lien law, for the bonds required were to take the place of mechanics' liens, feed furnished for the mules did not fall within the purview of the bond, not being 'material' used in the prosecution of the work, as the animals would have had to have been fed, though not used in constructing the levee."

SUMMARY OF STATE DECISIONS.

Kentucky. Food furnished to board men not supplies for construction of railroad.

Carson & Co. vs. Shelton et al., 128 Kentucky, 248, 15 L. R. A. (N. S.), 509.

The facts in this case are almost identical with those in the case at bar; Shelton boarded his men while they were engaged in the construction of a railroad. He bought groceries from Carson & Company, for which he did not pay. Carson & Company sued under the State Mechanics' lien law to enforce a lien for the amount due; held—

> "*Supplies for the construction of a railroad within the meaning of a mechanics' lien statute do not include food for men and teams while at work thereon, and the fact that the contractor to whom it is furnished boards his own hands is immaterial.*"

In the course of its opinion the court says:

> "The word 'supplies' would include powder or dynamite used in the construction of the railroad, or fuses to set off the powder, shovels and carts with which the work was done, and the like. *But the food that was furnished Shelton was not used in the construction of the railroad.*"

Indiana. Board, groceries, tobacco and money furnished to laborers are not materials going into the construction of railroad track and bridges.

Ferguson et al. vs. Despo, 8 Indiana Appellate Court 523, 34 N. E., 575.

> "The railroad company is not liable personally to such foreman for board, groceries, tobacco, money, or other supplies furnished by him to the employes of such sub-constructors; nor can the cost of such supplies be made a charge on its property, in the way of a mechanics' lien."

Kansas.

In *Parkinson vs. Alexander*, 37 Kans. 110, it was held that merchandise and provisions furnished to the employees of a sub-contractor, under an arrangement whereby such supplies were to constitute a payment pro tanto of their wages, are not embraced in the language of a bond of a railroad contract, executed in pursuance of a statute requiring it to be conditioned for the payment of

> "All laborers, mechanics and material men and persons who supply such contractor with provisions or goods of any kind";

and they cannot be brought within the terms of the bond upon the theory that they represent laborers' wages.

Michigan. Board for laborers and hay and feed for teams not material under the statute.

Dudley vs. Toledo A. A. & N. M. R. Co., 65 Mich., 655.

> "Feed furnished for teams in working upon the road, clothing or board of men so employed, would not come within the language or meaning of the Act, because such feed, board or clothing are not used in constructing or repairing the railroad."

Ohio. Hay, grain, straw, and feed furnished to a contractor for teams is not a furnishing of materials under the statute.

Pennsylvania Co. vs. Mehaffey, 75 O. S., 432.

"Under Section 3208, Revised Statutes, which provides that 'a person who * * * furnishes materials for or in the construction of any railroad, * * * in addition to his rights under the preceding section shall have a lien for the payment of the same upon such railroad,' the term materials, as therein used, comprehends and includes such articles only as are furnished for and not to be used in the construction of such railroad. *Therefore, a person who furnishes hay, grain, straw and feed to a contractor or sub-contractor for the keep of teams employed by them in working on said railroad, is not, within the purview and meaning of this section, furnishing materials.*"

Tennessee. Supplies in a commissary furnished to workmen in part payment for labor, not materials under the statute.

Luttrell vs. Knoxville, L. & J. R. Co., 119 Tennessee 492, 105 S. W., 565.

Provisions of the statute in this case were—

"That all persons who shall do any work or labor in constructing or improving the roadbed (etc.) of any railroad company * * * and all persons who shall furnish ties, fuel, bridges, or material to such Railroad Company, shall have * * * a lien (etc.)"

From the foregoing summaries it is plain that there is no conflict in the decisions either Federal or state and Federal concerning the allowance of board, food or groceries for workmen either under the Act of Congress or the statutes of the several states.

LIBERAL CONSTRUCTION.

There is no question but that the Act of Congress of Aug. 13, 1894 as amended February 24th, 1905, has been given a liberal construction, both prior and subsequent to its amendment.

It is now claimed, however, that the rule of *strictissimi juris* has no application when the surety is a corporation acting as such for a premium. In support of this extreme assertion counsel has cited *U. S. F. & G. Co. vs. Golden Pressed Brick Co.*, 191 U. S., 416, in which case the question was, Did the taking by the materialmen of thirty and sixty-day notes of the contractor, who had given the bond pursuant to the Act of Congress, relieve the surety company from its obligation under the ordinary rule that exonerates a guarantor in case the time fixed for the performance of the contract by the principal is extended without his consent? In the case cited above it appears that the Court expressly *found that the extension made was not unreasonable and did not prejudice the surety.* It plainly appears, therefore, that the case is not an authority for the general proposition that the rule of *strictissimi juris* does not apply in any case where the surety is a corporation engaged in the business of being a surety. Nor does it follow from this case that the rule of construction applied to mechanics' lien laws does not apply to the Act of Congress of February 24, 1905. In fact, the language of the Court at page 424 indicates that the Court did not intend to lay down the general proposition that the rule of *strictissimi juris* does not apply to surety companies. Near the top of the page we find:

> "It is, at least, *open to doubt, however, whether any relaxation of the rule should be permitted,*

as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris,* and with the understanding that it is entitled to the ordinary protection accorded the guarantors against changes in the contract or extentions of payment."

And at page 426:

"If the word 'promptly' has any particular significance in this connection it is satisfied by such payment as the sub-contractor shall accept as having been promptly made, or perhaps it was intended to give him an immediate action upon the bond in case such payment be not made with sufficient promptness. *It was not intended, however, that the want of an immediate payment should be set up as a defense by the surety.*"

This case cannot, with fairness, be urged as an argument in favor of stretching the meaning of the words *"labor and materials"* so as to make them include board and lodging, and certainly there is every reason for applying the same rule of construction, so far as labor and material are concerned, as is applied to cases under the mechanics' lien laws; for it is said, in *Guarantee Co. vs. Pressed Brick Co., supra,* page 425:

"This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. *Inasmuch as neither the contractor nor his sub-contractors can secure themselves by mechanics' lien upon the proposed building,* the government, *solely for the protection of the latter* (the sub-contractor) requires a covenant for the prompt payment of their claims and the security that it requires for the performance of the principal contract."

Thus it is clear that the Act of Congress was intended as a substitute for the rights secured to materialmen

by the mechanics' lien laws of the several states. Then why not apply the rules by which these laws are construed? The right to subject the bond to materialmen's claims is not a common law but a statutory right, and this is an additional reason why the Act should be strictly construed. The company undertook its obligation having in mind that the right secured to the materialmen was one provided for by statute, and therefore subject to strict construction. We do not insist, however, upon a strict construction, but ask for a natural and reasonable construction of the Act.

It would seem from the brief of plaintiff in error that a surety company acting for a premium was thereby placed under a ban or curse which removed it from the protection of the law. The surety company is not denied the rule of strict construction because it is paid for acting as surety, but because, unlike the personal surety, it prepares its own form of contract, and, when this contract is open to two constructions, the construction against the insurer and most liberal to the insured will prevail. But, if the terms of the contract are clear and not fairly susceptible of two constructions an ambiguity cannot be assumed and the plain intention of the parties nullified by construction.

In *American Surety Co. vs. Pauly* (No. 1), decided by the Supreme Court of the United States, April 18th, 1898, 170 U. S., 133, it was held:

> "In an action against the maker of a bond, given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, *if the bond was fairly and reasonably susceptible of two constructions,* one favorable to the bank and the other to the insurer, the former, if consistent with the objects for which the bond was given, must be adopted."

And at page 144 the Court lays down reasons for the rule as follows:

> "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, *and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company.* This is a well established rule in the law of insurance. * * * As said by Lord St. Leonards in *Anderson vs. Fitzgerald,* 4 H. L. Cas. *484, *507, 'it (a life policy) is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' "

In *City of Topeka vs. Federal Union Surety Co. et al.,* 213 Fed., 958, decided by the Circuit Court of Appeals of the 8th Circuit, the court held:

> "The general rule that a surety should be held only where his liability is fixed by the most strict law does not apply to a corporate surety, which is engaged in the business of becoming surety for premiums supposed to be based on the amount of the risk, but, on the contrary, such contracts are construed most strongly against the surety."

The reason for the court's ruling appears from the language used at page 962:

> "Before proceeding to a consideration of the law questions directly involved, it may not be amiss to point out in a degree the status of the complainant. *It is entitled to just the same consideration as ordinary litigants.* Generally the surety is a favorite of the law, and should be held only where his liability is fixed by the most strict law. That is to say, what is known as the rule of *strictissimi juris* applies. These rules have no application to a corporate surety which is engaged in the business of becoming surety for

> premiums which are supposed to be based upon the amount of such risks. It is not in the position of a voluntary surety who signs his principal's obligation. *Upon the contrary surety bonds are usually on forms prepared by the company,* and in place of a strict construction in favor of such surety the instrument is construed most strongly against the surety. *Contracts of such compaines bear a distinct analogy to insurance, and are largely governed by the same rules in construction.*"

From the cases cited above it appears that courts have simply declined to treat the corporate surety company as the favorite of the law or to apply for its benefit narrow interpretations of its contracts of suretyship, but have resolved to give them the same consideration as other litigants and construe their contracts by the rules of construction applied to insurance companies for the reason that they prepare their own forms of contract. But it is still true, as announced in *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S., 416, at page 424:

> "It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

This language was used in connection with a case arising under the Act of August 13th, 1894, which as amended February 24th, 1905, is under discussion in the case at bar.

Also, as said by this Honorable Court in discussing the construction of suretyship contracts in *Guaranty Co. of N. A. vs. Mechanics S. B. & T. Co.*, 183 U. S., 402 at 419:

> "The object should not be defeated by any narrow interpretation of its provisions nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument * * * but this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the clear meaning of the parties and embodying requirements, compliance with which is made the condition to liability thereon."

It should be kept in mind at this point that the form of the contract and bond which was executed by The Standard Contracting Company as principal and National Surety Company as surety was not prepared by the Surety Company or its attorneys, but by the United States, and the additional obligations of the bond for the benefit of those furnishing labor and materials were prescribed by the terms of the Act of Congress.

We do not ask for any narrow construction of the Act, but only for a natural and reasonable construction of the words "labor" and "materials" as used in the Act, and respectfully submit that the interpretation given the Act by the Honorable Court of Appeals in the case at bar was reasonable and correct.

THE WORD "USED"—ITS SIGNIFICANCE.

In the sixth assignment of error, plaintiff in error asserts that the court below erred in deciding that labor and material furnished must be "used in" the construction of a public work before they could form a basis of an action by one furnishing them. Having in mind that the right of laborers and materialmen to recover against a surety on the bond of the contractor is purely statutory

and did not exist at common law and that the provision of the bond that the contractor

> "shall promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract"

is expressly required by the Act of Congress of Aug. 13, 1894, as amended February 24, 1905, we are justified in contending that the provision of the bond is no broader than the provisions of the statute. The right of the laborers or materialmen depends entirely upon what is given him by the statute. The original Act of August 13, 1894, provided that the bond of the contractor should contain

> *"the additional obligations that such contractor * * * shall promptly make payments to all persons supplying him * * * labor and materials in the prosecution of the work provided for in said contract"*

and, if payment is not made, that the persons so supplying labor and materials

> *"shall have a right of action and shall be authorized to bring suit in the name of the United States * * * against said contractor and sureties."*

The same Act as amended February 24, 1905, in giving the right to laborers and materialmen to sue, used the following language:

> "Any person, company or corporation who has furnished labor or material *used in* the construction or repair of any public building or public work and payment for which has not been made, shall have the right to intervene and may be made a party * * * and have their rights and claims adjudicated in such action and judgment rendered thereon."

However liberal the courts may have been in construing the Act, it is obvious that in its present form the right of action conferred thereby to laborers and materialmen is for such labor and material as is *used in* the

construction of the work. The Court of Appeals recognized this feature of the Act in considering the case below generally. There were many other items of material involved beside the groceries claim of John P. Brogan. Some of the earlier cases cited in briefs of the various claimants had been decided before the amendment of February 24, 1905, and it was therefore necessary, in determining the bearing of such cases upon the case at bar, to consider carefully the difference in the language used in the respective Acts of Congress, by which a right of action was conferred upon laborers and materialmen. A careful reading of that part of the opinion of the Court of Appeals, which deals with this question, will make it clear that they considered this question as only incidental to the general interpretation of the present Act of Congress (see rec. page 52). It is, however, a well-established proposition of law, that a right which rests upon a statute must be exercised strictly in accordance with the terms and provisions of that statute.

When the Court of Appeals came to consider the allowance of the groceries claim of plaintiff in error Brogan, it merely decided that these groceries sold by Brogan did not constitute "labor furnished or material used in the construction of the work" within the fair and reasonable meaning of the Act.

DECISION OF THE COURT OF APPEALS DISCUSSED AND ANALYZED.

After discussing the construction placed upon the term "*used in*" as an alleged basis for the decision of the Brogan claim, it may be well to outline what we consider were the real bases for the court's decision. The

consideration of the words "used in" was not controlling but there were several other grounds for declining to allow the Brogan groceries claim. Referring to the court's opinion at Record pages 55 and 56, we find two reasons for the court's decision which do not depend upon the construction of the words "*used in*" as they appear in the amended Act of February 24, 1905.

First, as expressed by the Court,

> "*on the other hand, the food for the men never contributes to the work except after it is transmuted into the form of that labor which, as labor, is protected. It is not to be thought that the statute gives twice a claim for the one thing. In this case, the entire labor right has been satisfied. The contractor paid the men their wages and furnished them their board and they have no claim.*"

A reference to the admitted facts will substantiate the absolute soundness of this finding. The contractor boarded the men and deducted $22.50 per month from each man's wages, in payment of the board so provided (statement of facts in brief of plaintiff in error, page 7, and rec. pages 9, 10, 11 and 12). In other words the men were paid in two mediums—money and food. It is only claimed that these groceries—this food—entered into the work contracted to be done by virtue of its having been consumed by the laborers. Therefore the conclusion of the Court of Appeals must be correct, i.e., that the material furnished by Brogan only entered into the work under prosecution by the contractor after being transmuted into the form of physical energy and that it became related to the Government contract only indirectly as labor and never as material. The claim sued upon was for goods sold and delivered (see rec. page 3, and quotation from the intervening petition of Brogan, at page —, supra). Counsel for plaintiff in error has attempted to shift his

claim from one for materials to one for labor, and now asks in the alternative that his claim be allowed, either as materials supplied or labor furnished (see brief of plaintiff in error, under title "Questions of Law," first and second errors claimed, pages 9 and 10). It is therefore apparent that he has receded from his position that the groceries furnished for the workmen were materials used in the prosecution of the work and concurs in the court's conclusion that these materials never entered into the work until they were transmuted into the form of labor. In this position he is fully answered by his own admission and the finding of the Court of Appeals that all labor claims have been paid and that the labor claim cannot twice be asserted against the surety.

Second, as expressed by the Court of Appeals (rec. page 56),

> "*Money that may have been borrowed to pay part of their wages is, on this principle (though not in responsiveness to the name 'materials') difficult to distinguish from the food borrowed—bought on credit—to pay the balance of their wages, but such money loans are not lienable.*"

Reference here was made to 47 Cyc., 44. This is obviously a typographical error, and should have been 27 Cyc., 44.

When the contractor established a commissary department in connection with the performance of his contract, he entered upon a separate or at least a collateral enterprise. From the facts stated by reference to the record in the early part of this brief, it appears that the so-called barren wilderness contained two villages,—one about five and the other three miles distant from the place where the work was performed. One of these villages had several hundred inhabitants and five to ten of

the workmen came from these villages every day and boarded themselves. It thus appears that the commissary enterprise undertaken by the contractor was collateral only to the work of performing the contract and was an arrangement made by him for his own convenience and not solely from necessity. It may have been conducted for profit, for we note in the testimony of J. P. Brogan (rec. pages 13 and 14) that the supplies were sold to the contractor by Brogan at jobbing prices; that is, wholesale rates, whereas the contractor received payment for the groceries from the workmen at the union scale of $22.50 per month.

It is apparent from the foregoing that the plaintiff in error Brogan was not furnishing materials adapted for the construction of any part of the work to be performed under this contract, but that he loaned or advanced on credit to the contractor certain commodities with which the contractor paid his laborers. As found by the court below, there is not now and never has been any unpaid labor claim involved in this litigation. Money loaned to meet the payroll of the contractor has never been allowed as a lienable claim in the State courts. We also find that the question has been considered by the Federal courts as well. In the *United States to Use of Fidelity Nat. Bank vs. Rundle et al.*, decided by 9th Circ. Ct. of Appeals, February 4, 1901, 107 Fed., 227, it was held:

> "Sureties on a bond of a contractor, conditioned for payment of persons supplying him with 'labor or materials,' are not liable to a bank which, under an arrangement to supply the contractor with funds, pays the time checks given the laborers and the orders given the materialmen; the same being indorsed merely as evidence of payment, without any assignments of the claims being made."

This action was brought under the Act of Congress of August 13, 1894, and the contractor, Rundle, had executed a bond with a provision to

> "promptly make full payment to all persons supplying him labor or materials in the prosecution of the work provided for in said contract."

An arrangement was made by the contractor whereby a bank was to furnish him with money as might be required to pay for labor, for which the bank was to receive an assignment of the total amount due; and at page 228 it appears

> "It was arranged that the labor debts should be paid by time checks, and that the bank should receive its compensation by discounting the time checks 3 per centum. This was the understanding as testified to by all the witnesses. Nothing was said in any of the conversations concerning an assignment of the claims of laborers and material men to the bank, and none of such claims were in fact assigned to the bank, except the three claims mentioned in the verdict. * * * *The whole transaction, as it is detailed by all the witnesses, amounted to an agreement whereby the bank agreed to loan money to Rundle to carry out his contract, and to permit him to check out the loan as required to pay the laborers.* When the time checks were paid by the bank they were indorsed as any other checks would have been indorsed by the payees. *There is nothing in the circumstances to show an assignment to the bank of any of these time checks for labor* or the orders for the payment of materialmen, or that it was the intention of the bank to take such assignments, *or to become substituted to the rights of such payees.* * * * It is true that an assignment may in some cases be made by parol, and that under certain circumstances the presumption will arise that an assignment was intended solely from the nature of the transaction. But in the circumstances of the present case we discover nothing upon which to rest such

a presumption. *The agreement was wholly between the contractor and the bank. The laborers and the materialmen were not parties to it.* They took their checks and their orders to the bank as directed, and were there paid. The checks and orders were indorsed as evidence of payment, and for no other purpose, and the bank retained them as vouchers. In this there was no assignment."

In *Hardaway vs. National Surety Co.*, 211 U. S., 552, this Honorable Court affirmed the holding of the Circuit Court of Appeals in 80 O. C. C., 283, 150 Fed., 465, holding that persons who, in view of the financial embarrassment of a public contractor, undertake to superintend the completion of a public work, and to furnish the necessary funds, for which they are to be paid by an assignment of the reserved funds in the hands of the government, and by checks or payments under the original contract, are not sub-contractors furnishing labor and materials for the fulfillment of such original contract, so as to be entitled to the protection of the bond executed pursuant to the Federal act requiring that it be conditioned for the prompt payment by the original contractors to all persons supplying them with labor or materials in the prosecution of the work.

Other state cases covering the same proposition are the following:

Kadenehec vs. Antonello, 127 Cal., 382;
City of Hamilton vs. Stilwaught et al., 11 O. C. C., 182;
Evans vs. Lower, 58 Atl., 294; 67 N. J. Eq., 232;
Gaylord vs. Laughridge, 50 Tex., 57;
Godeffroy vs. Caldwell, 2 Cal., 489;
Uralde A. Paving Co. vs. City of New York, 191 N. Y., 244;
McCormick vs. Los Angeles Water Co., 40 Cal., 185.

Parkinson vs. Alexander, 37 Kan., 110, is almost squarely in point, for in that case it was held that merchandise and provisions furnished to the employees of a sub-contractor, under an arrangement whereby such supplies were to constitute a payment *pro tanto* of their wages, are not embraced in the language of a bond of a railroad contract, executed in pursuance of a statute requiring it to be conditioned for the payment of

> "All laborers, mechanics and materialmen and persons who supply such contractor with provisions or goods of any kind";

and they cannot be brought within the terms of the bond upon the theory that they represent laborers' wages.

From the foregoing it is clear that plaintiff in error, Brogan, does not stand in the position of a subcontractor or the assignee of labor claims, but merely in the position of one who, upon the credit of the contractor, advanced him either money or property with which to pay his labor, and in neither case does he come within the provisions of the Act of Congress now under consideration.

ASSIGNMENT OF LABOR CLAIMS.

Notwithstanding the fact that Brogan's intervening petition asked for a money judgment for goods sold and delivered, counsel for plaintiff in error in his brief attempts to convert the Brogan claim into a claim for labor on the theory that the labor claims were assigned by the workmen to Brogan. In the first place, his intervening petition did not allege any facts to support a claim on this basis. No evidence of an assignment of labor claims to Brogan was offered or received in the case, as will appear from the record.

In *Bartlett vs. U. S. F. & G. Co.*, 231 U. S., 237, it is held:

> "Under the circumstances of this case held that the claims of laborers for wages had been properly assigned to the claimant and clothed him with legal right to maintain an action upon the bond given under the Act of August 13, 1894."

The facts concerning the assignment do not appear in this case. This Honorable Court merely states at page 243:

> "We think that the testimony discloses that so much of the laborers' wages as were necessary to satisfy Bartlett's advances were assigned to him with their consent and deductions to that extent made from such wages with their approval in such wise as to consummate the assignment."

The facts appear more particularly from the statement contained in the report of the case as tried by the Court of Appeals, 189 Fed., 339. At page 340 we find the following statement:

> "The plaintiff furnished supplies for the laborers at the quarry under an arrangement with Donovan that the amounts of their respective monthly accounts should be deducted from the payroll and at the end of each month *the accounts with such deductions were submitted to the men and were approved by them.*"

In the case at bar no such state of facts existed. The board was furnished to them as part of their wages and the amount, $22.50 in accordance with the union scale of wages, was deducted from their pay each month. In effect, they paid their board to the contractor. The plaintiff in error, Brogan, was in no sense a party to the transaction between them. We confidently assert therefore that the facts in this case would not bring it within the law as laid down by the Supreme Court in *Bartlett vs. U. S. F. & G. Co.*, 231 U. S., 237.

The case of *United States vs. Kimpland,* 93 Fed., 403, is relied upon to the same effect. Here the facts were practically the same as in the *Bartlett case,* 231 U. S., 237 supra. The contractor made an agreement with Ellen Sica whereby she agreed to furnish board for workmen of the contractor, in consideration whereof the contractor agreed to pay the bills presented by Sica for the board of workmen out of the moneys that might be due them as wages, provided said workmen should respectively consent to the deduction of said board.

In the case at bar there is absolutely no evidence of any assignment or attempted assignment, and the claim of Brogan based upon an assignment from the laborers to Brogan is therefore without foundation in law or fact.

The case of *United States for the use of Fidelity National Bank vs. Rundle et al.,* 107 Fed., 227, and *Parkinson vs. Alexander,* 37 Kan. 110 supra, also bear upon this point.

PLACE OF PERFORMANCE.

We will not weary the Court with a discussion of a matter which is so obviously immaterial as the claim of plaintiff in error that the place of performance of the contract has any bearing upon the question of what constitute labor and materials within the meaning of the Act of Congress here in question. We have already commented upon the "barren wilderness" in which the work had to be performed and from the portions of the record heretofore referred to it is plain that there were two villages within less than five miles of the place. But grant, for argument's sake, that the work had

to be performed in an uninhabited wilderness, that fact could not affect the obligation of the contractor and its surety to pay the claims of laborers and materialmen who furnished labor and materials used in the performance of the contract.

In the case at bar all the labor claims have been paid. Payment is the essential requirement and the medium of payment is immaterial. The geographical location of the place of performance has no logical bearing upon the construction to be placed upon the words "labor" and "materials" as used in the Act of Congress.

Reference is made to the provision in the government's contract with The Standard Contracting Company, which requires that the contractor shall furnish the government inspectors with sleeping accommodations and board, which are to be paid for by the United States at fixed rates per diem, but nowhere in the record or pleadings of the plaintiff in error is there anything to indicate that at any time the contractor was required to so accommodate and board any government inspector. All the evidence and statements of counsel in both record and brief are to the effect that:

> "It was necessary for the contractor to maintain the commissary at which the men boarded in order to secure and maintain workmen for the job. (Statement of the case in brief of plaintiff in error, page 2.)

Upon these facts and no others has the plaintiff in error based his claim from the moment he first asserted it by his intervening petition, in repeated statements of fact which appear in the record, and in all of the evidence offered in the case.

It is idle, therefore, to rely upon this incidental provision of the contract which has to do only with accommodating government inspectors.

FINAL WORD.

We wish to adopt as part of this brief the able reasoning of the Honorable Court of Appeals, which considered this case below, especially that portion of the opinion which bears upon the claim of John P. Brogan. This appears at pages fifty-five, fifty-six and fifty-seven of the record. The groceries and supplies furnished by Brogan to be allowed as a claim for which judgment may be had against the surety on the contractor's bond must be either labor or materials. It cannot be both. Counsel for the plaintiff in error has turned away from his original claim that the groceries constituted materials within the meaning of the Act. This departure was made apparently for the reason that he could not show how they entered into the construction of the work except through the medium of the men who consumed the groceries. In that event they entered into the work as labor, but under the undisputed facts there is no unpaid labor claim. Finding himself in this dilemma, counsel for plaintiff in error in order to save himself is compelled to claim an assignment of wages from the workmen to Brogan. By no vague implied presumption can this be done. An assignment must be based on a contractual relation between the assignor and the assignee. The record is silent as to any relation or dealing whatsoever between the laborers and Brogan. Brogan in Cleveland knew no one but The Standard Contracting

Company, to whom he sold his groceries on credit. The laborer knew no one but the Standard Contracting Company, from whom he received his wages.

The purpose of the Act of Congress in securing to the laborer his wages is to make certain to *him* the cost of his maintenance. He sells his physical exertions and there must be secured to him the wherewithal to live upon. The right to assert the claim for labor against the surety is a personal right vested solely in the laborer himself until such time as he, by legal assignment, transfers this claim to another. Such assignment cannot be made without some act on his part or agreement with the assignee. When the laborer's claim is paid it is extinguished forever and the surety on the bond is absolutely released from the contingent liability which it constituted.

The liability arising from unpaid labor claims cannot now be revived by any implied assignment, which, so far as it has been asserted in this case, is without substance or consideration. If this could be done, the surety would be twice liable for the same thing, which is beyond the limits of reason or justice.

There is no ambiguity or uncertainty in the Act upon which to invoke the doctrines of construction asked for by the plaintiff in error. We most respectfully submit that the Supreme Court of the United States will not exercise its plenary powers to give to the Act of Congress in question a construction so unnecessary and unjust as the one asked for by plaintiff in error. All of the federal and state courts which have considered the question in controversy have uniformly held that board for workmen can not be made the basis of a claim against the bond or a lien upon the land under the name of labor

and materials furnished either by virtue of the Act of Congress or of the mechanics lien laws of several states.

We submit therefore that upon reason and authority the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN M. GARFIELD,
Counsel for National Surety Company.

Where, because of special circumstances, it was clearly indispensable to the prosecution of a public work that the contractor supply board to the laborers, and board was so supplied, exclusively in the work, the price being deducted monthly from their wages, *held*, that groceries and provisions furnished the contractor and so consumed by the laborers were materials used "in the prosecution" of the work, within the meaning of the aforesaid acts and the bond given to secure the contract.

In the absence of special circumstances making the boarding of the men a necessary and integral part of the work,—as where a contractor runs a boarding house as an independent enterprise, for profit,—the case would be outside the statute.

228 Fed. Rep. 577, reversed.

THE case is stated in the opinion.

Mr. John A. Cline for plaintiff in error.

Mr. John M. Garfield, for defendant in error, upon this question, distinguished *Lybrandt* v. *Eberly*, 36 Pa. St. 347; *Bangs* v. *Berg*, 82 Iowa, 350–353; *Kollock* v. *Parcher*, 52 Wisconsin, 393; and cited *Giant Powder Co.* v. *Oregon Pacific Ry. Co.*, 42 Fed. Rep. 470; *Sears* v. *Mahoney*, 66 Fed. Rep. 860; *Sica* v. *Kimpland*, 93 Fed. Rep. 403; *Bartlett* v. *U. S. Fidelity & Guaranty Co.*, 231 U. S. 237; *s. c.*, 189 Fed. Rep. 339; *Samuel Hastings Co.* v. *Lowrence*, 236 Fed. Rep. 1006; *Carson & Co.* v. *Shelton*, 128 Kentucky, 248; *Ferguson* v. *Despo*, 8 Ind. App. 523; *Parkinson* v. *Alexander*, 37 Kansas, 110; *Dudley* v. *Toledo A. A. & N. M. Ry. Co.*, 65 Michigan, 655; *Pennsylvania Co.* v. *Mehaffey*, 75 Ohio St. 432; *Luttrell* v. *Knoxville, L. & J. R. Co.*, 119 Tennessee, 492, as upholding the view that claims for board, food or groceries for workmen are not within either the act of Congress or state mechanics' lien statutes.

The men were paid in two mediums—money and food. It is only claimed that these groceries—this food—entered into the work contracted to be done by virtue of its having been consumed by the laborers. Therefore the conclusion of the Court of Appeals must be correct, i. e., that the

material furnished by Brogan only entered into the work under prosecution by the contractor after being transmuted into the form of physical energy and that it became related to the government contract only indirectly as labor and never as material. Brogan was not furnishing materials adapted for the construction of any part of the work to be performed under this contract, but loaned or advanced on credit to the contractor certain commodities with which the contractor paid his laborers. As found by the court below, there is not now and never has been any unpaid labor claim involved in this litigation. Money loaned to meet the payroll of the contractor has never been allowed as a lienable claim in the state courts. Nor does it give rise to a claim under the federal act. *Fidelity National Bank* v. *Rundle*, 107 Fed. Rep. 227; *Hardaway* v. *National Surety Co.*, 211 U. S. 552. See also *Parkinson* v. *Alexander*, 37 Kansas, 110; *Cadenasso* v. *Antonelle*, 127 California, 382; *City of Hamilton* v. *Stilwaught*, 11 Oh. C. C. 182; *Evans* v. *Lower*, 67 N. J. Eq. 232; *Gaylord* v. *Laughridge*, 50 Texas, 57; *Godeffroy* v. *Caldwell*, 2 California, 489; *Uralde Paving Co.* v. *City of New York*, 191 N. Y. 244; *McCormick* v. *Los Angeles Water Co.*, 40 California, 185.

Mr. Justice Brandeis delivered the opinion of the court.

This is an action against the surety on a bond given under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811. The claim of Brogan, an intervening petitioner, was allowed by the District Court; but the judgment was reversed by the Circuit Court of Appeals and judgment entered against him upon the undisputed facts (228 Fed. Rep. 577). The case comes here on writ of error under § 241 of the Judicial Code.

The facts undisputed or as found by the lower court and accepted by the Court of Appeals were these: The Standard Contracting Company undertook to deepen the channel in a portion of St. Mary's River, Michigan, located "in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses" and the contractor "was compelled to provide board and lodging for its laborers." Groceries and provisions of the value $4,613.87, furnished it by Brogan, were used by the contractor in its boarding house; and were supplied "in the prosecution of the work provided for in the contract and the bond upon which this suit is based. They were necessary to and wholly consumed in such work." The number of men employed averaged 80. They were "boarded" partly on the dredges, partly in tents supplied by the contractor; all under an arrangement made with the labor unions—by which the contractor was to board the men and deduct therefor $22.50 a month from their wages. The contract and the bond executed by the National Surety Company bound the contractor to "make full payment to all persons supplying him with labor or materials in the prosecution of the work provided for in" the contract.

The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate. But the surety contends that the words "in the prosecution of" the work are not used in the bond and the act in their natural sense, but should be given a conventional meaning so as to exclude labor and materials which contribute to construction only indirectly, as do the supplies consumed by a contractor in operating his plant. In support of this position, attention is called to the fact that while the Act of 1894 provided that the bond should have "the additional

obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work;" and that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work"; the Act of 1905 specified that recovery could be had by the persons who had "furnished labor or materials *used* in the construction or repair" of the work. But the change in phraseology is not significant. The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor. *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 218. See Report of Committee on H. R. 13,626, 58th Cong., 2d sess., No. 2360. It was pointed out in *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 538, that "In respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894;" and in *Hill* v. *American Surety Co.*, 200 U. S. 197, 201, that "In respect to the persons entitled to the benefit of the bond there has been no material change in the act." *Illinois Surety Co.* v. *Peeler*, *supra*, p. 224.

This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 34, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which entered into the construction of the ship. In *United States Fidelity Co.* v. *Bartlett*, 231 U. S. 237, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened fifty miles away. This included, as the record shows, the labor not only of men who stripped the earth

to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment; and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks. In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, recovery was allowed not only for the rental of cars, track and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

The Circuit Court of Appeals deemed immaterial the special circumstances under which the supplies were furnished and the findings of fact by the trial court that they were necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond. In our opinion these facts are not only material, but decisive. They establish the conditions essential to liability on the bond. The bare fact that the supplies were furnished to the contractor and were consumed by workmen in its employ would have been immaterial. A boarding house might be conducted by the contractor (like some company stores concerning which States have legislated, *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224) as an independent enterprise undertaken solely in order to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the particular locality where the public work is being performed. The laborers might resort to such a boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a matter independent of the work provided for in the

contract and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work and necessarily involved in it. Like the supplying of coal to operate engines on the dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers, are materials supplied and used in the prosecution of the public work. The judgment of the Circuit Court of Appeals is therefore reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY, and MR. JUSTICE MCREYNOLDS dissent.

BROGAN *v.* NATIONAL SURETY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 171. Argued January 30, 31, 1918.—Decided March 4, 1918.

The Act of August 13, 1894, c. 280, 28 Stat. 278, and the bonds given under it, must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

The act is not limited in application to labor and materials directly incorporated into the public work. The amendment of February 24, 1905, c. 778, 33 Stat. 811, does not change it in this respect.